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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,

and

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervenor-Appellants,

v.

RINGSBY TRUCK LINES, INC., et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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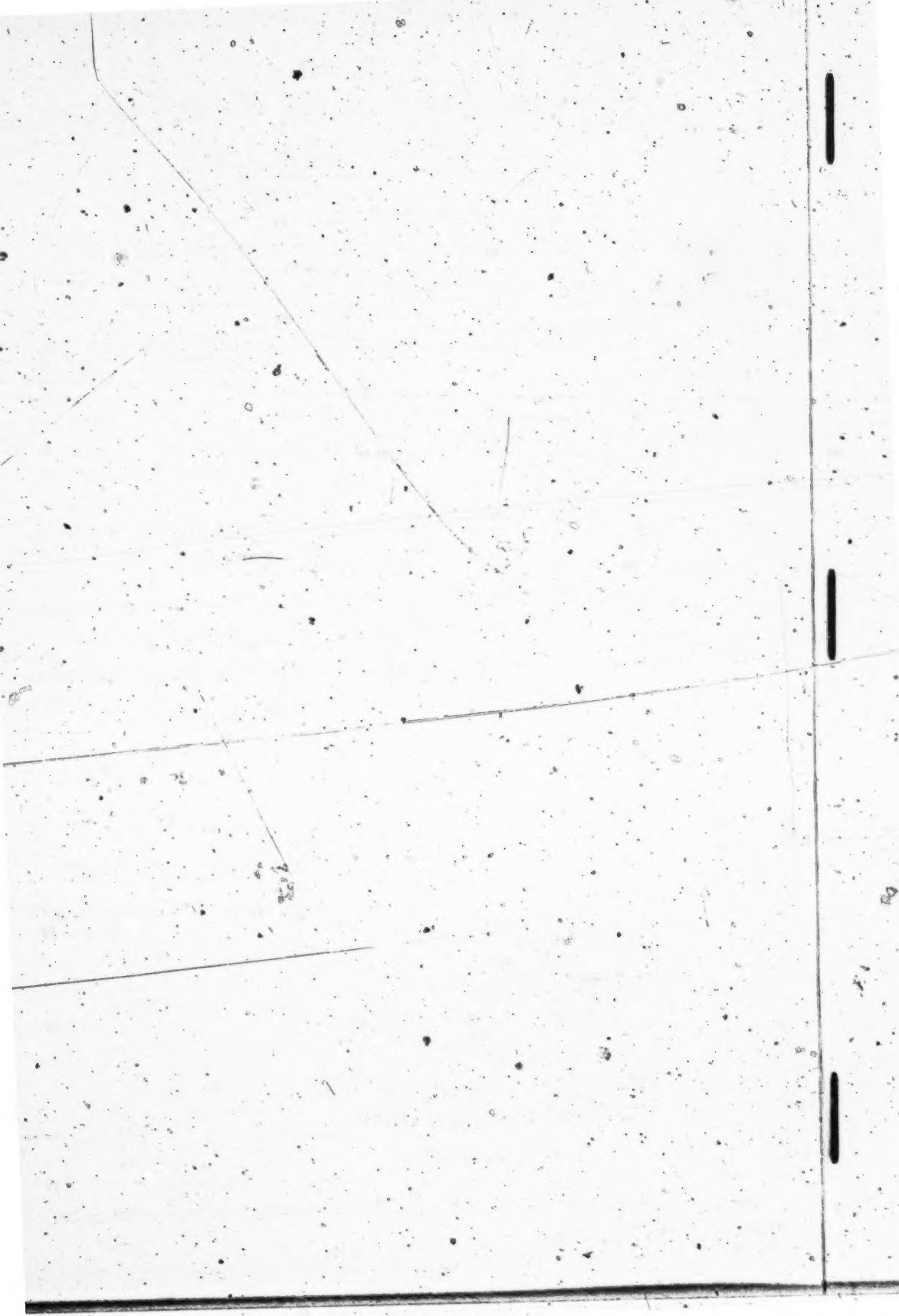

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JURISDICTIONAL STATEMENT

Appellants are shipper leagues who intervened on the side of defendants in the action below and appeal from the judgment of the District Court setting aside an order of the Interstate Commerce Commission. Appellants submit that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the District Court is reported at 263 F. Supp. 552. The report of the Interstate Commerce Commission is printed at 326 I.C.C. 397. This

contains the Commission decision of April 15, 1966, under review by the District Court. A report on reconsideration was issued by the Commission on February 1, 1967. This supplemented and affirmed the prior decision. The District Court's opinion is attached as Appendix A, the Commission's report of April 15, 1966, as Appendix B, the Commission's report of February 1, 1967, as Appendix C.

Jurisdiction

This action was brought by the motor carrier plaintiffs under 28 U.S.C. 1336, 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission. The three-judge District Court entered judgment on January 5, 1967 setting aside the Commission's order. Notice of appeal was filed in that court on March 6, 1967. The jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *Southern Ry. Co.* v. *State of North Carolina,* 376 U.S. 93; *United States* v. *Drum,* 368 U.S. 370.

Statutes Involved

28 U.S.C. 2284 provides:

> THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE
>
> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided

by law, shall be as follows: [(1) and (2) not relevant]

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—[(a), (b) and (c) not relevant]

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for

certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Questions Presented

The Interstate Commerce Commission, after investigation and hearing, ordered motor carrier schedules effecting a general increase in rates cancelled for failure of the carriers to adduce evidence requisite to support findings that the increased rates were just and reasonable. A restraint on operation of the Commission's order imposed by a single District Court judge was permitted to remain in effect from September 9, 1966, to January 5, 1967, with no ruling by the three-judge Court on appellants' motion to dissolve or appellees' application for interlocutory injunction. On January 5, 1967, the three-judge Court set aside the Commission's order. The questions presented are these:

1. Did the District Court contravene 28 U.S.C. 2284 and 5 U.S.C. 1009 by compelling the maintenance in force of increase schedules ordered cancelled by the Commission when a restraint on the Commission's order was not required to prevent irreparable damage or to preserve status or rights pending conclusion of the review proceeding?

2. Did the District Court exceed the proper function of a reviewing court by superseding the Commission's judgment of the evidence submitted by the carriers with the Court's evaluation of the

evidence on the basis of standards no longer in effect.

3. Did the District Court err in setting aside the order of the Commission as unsupported by sufficient findings of fact?

Statement

In a report and order issued April 15, 1966, the Interstate Commerce Commission found a general increase of 3 percent in motor carrier rates in Transcontinental territory not shown to be just and reasonable and directed cancellation of the increase tariffs. Fifteen of the affected motor carriers (some 1400 participated in the tariffs) brought suit before the three-judge Court to set aside the Commission's order.

The Commission's decision was based on observed deficiencies in the carriers' evidence deemed fatal to their case. The carriers had submitted cost and traffic studies for the purpose of showing that increases in operating expense justified the increases in rates. These studies were constructed from data supplied by 18 carriers. They were offered as true as well for 1400 carriers who made up the universe of territorial carriers participating in the increase tariffs. The traffic study (also drawn from the 18 carriers) was derived from one week's truckload movements and one day's less-truckload shipments. It was offered as true as well for a full year's operations. The Commission stated that, in order to reflect reliably the conditions of operation and cost in the territory, carriers selected for inclusion in the study group had to be shown to be

representative of carriers as a whole operating in the territory. Similarly, the time interval selected for study had to be shown typical of the entire period. More than a year before these increases were published, the Commission had admonished the carriers in the involved Transcontinental territory that it was not satisfied with the quantum of evidence produced in such cases (319 I.C.C. 792, 803). In this very proceeding, immediately upon instituting investigation, the Commission issued an order calling on the carriers to submit "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved". The same order required the carriers to adduce "detailed data to establish the representative nature of the carriers used", and that "the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound". The Commission found that the study carriers had not been shown to be representative and the study period had not been shown typical. Some witnesses for the carriers had declared that the carriers selected and the time intervals used were representative, but no evidentiary showing had been made of the method of selecting the carriers; of tests made or statistical standards observed to assure that the selection of carriers was representative and the choice of the time intervals typical of conditions as a whole in the territory. Moreover, data submitted by the carriers as to their financial ratios was deemed inadequate to permit a finding of need for added revenues.

The Commission concluded that the carriers had failed to present competent and substantial evidence

in discharge of their statutory burden of proof. It held that a need for added revenues and the extent of such a need had not been established and that the general increase was not shown to be just and reasonable. The Commission ordered the increase tariffs cancelled and, after denying the carriers' reconsideration petition, fixed September 12, 1966, as the compliance date.

Fifteen carriers (of the 1400 tariff participants) now brought suit in the court below and moved to restrain operation of the Commission's order of cancellation. On September 9, 1966, a single judge, acting prior to formation of the three-judge Court, granted a temporary restraining order over the opposition of the Government and shipper interests. The motor carrier applicants were not required to post the security provided in Rule 65(b) of the Rules of Civil Procedure. On September 20, 1966, appellants (2 national associations of shippers and receivers of freight) submitted to the Court a motion for leave to intervene in defense of the Commission's order; a motion to dissolve the temporary restraining order; a motion to require a bond; a motion for an order to protect shippers and receivers of freight from irreparable loss should the Commission's order be found to have been wrongfully restrained. None of these motions was acted on until October 11, 1966. On that date, the three-judge Court granted the appellant shipper leagues leave to intervene and their answer to the complaint, including a counterclaim, was ordered filed. All other motions, including the motion to dissolve the temporary restraining order and plaintiffs' application for interlocutory injunction, remained undecided, the Court

stating that they would be heard on November 4, 1966, when trial on the merits would be had. None of these motions was in fact ever disposed of nor was appellants' counterclaim determined. The temporary restraint of the Commission's order was kept in force to the date of hearing on November 4, 1966 and continued in force to January 5, 1967 when the three-judge Court issued its decision on the merits. The Court stated that evidence as to the representative nature of carriers used for the cost and traffic studies was substantially the same as evidence held sufficient in cases decided between 1949 and 1963 and that the Commission had previously upheld studies in which the period was as short or shorter than that used in the present case, citing cases decided in 1949, 1952, and 1962. It stated that the Commission had departed from the standards of proof required in earlier cases and had failed to point out specifically in what respects the carriers fell short. The Court concluded that the Commission's findings and reasoning were insufficient to justify its holding. It set aside the Commission's order and remanded the matter.

On February 1, 1967, the Commission responded to the remand with a report which supplemented the earlier report and affirmed the prior decision. It ordered the increase tariffs cancelled by March 10, 1967 but postponed that compliance date should the carriers file complaint in court for further review. Such a complaint was filed on February 27, 1967 in the same District Court and the same three-judge Court was constituted on March 2, 1967.

The Questions Are Substantial

The questions raised by this appeal probe the fundamental relation of administrative agency and reviewing court as they interact in general increase proceedings. Such cases, by definition, are of sharp impact and sweeping territorial effect. They generate difficult problems of proof, as well as of law. Questions as to standards of proof and the power of the agency to formulate and apply them are of the utmost significance in this sector of transport regulation. They merit decisive resolution.

Broad-gauged as such issues are, they are equaled or exceeded in importance by questions that have been extruded in the very process of invoking judicial review of agency action in a general increase proceeding. These questions involve fundamental rights of shipper and carrier, when Commission orders are sought to be restrained, with respect to the subject of agency action—collection of the rate increases. Pressing issues in this sphere have not previously reached the Supreme Court. The action of the court below is in conflict with decisions of other district courts. Such conflicts urgently call for resolution in the context of the present turbulent and formative period in motor carrier ratemaking.

1. The Restraining Order

An ineluctable condition is attached to the extraordinary remedy of temporary or interlocutory restraint—the prevention of irreparable damage. Rule 65 (b) of the Rules of Civil Procedure terms it

"immediate and irreparable injury, loss or damage." In the three-judge reviewing procedure, the condition is stipulated by statute. 28 U.S.C. 2284 (3) makes irreparable damage the prerequisite to grant of a temporary restraining order pending determination of an application for interlocutory injunction. 5 U.S.C. 1009 (d) authorizes the reviewing court, "to the extent necessary to prevent irreparable injury" to issue process to postpone the effective date of agency action or to preserve status or rights pending judicial review. Neither irreparable injury nor the status-rights condition was present here.

There was and is no threat of irreparable injury to the carriers through effectuation of the Commission's order pending judicial review. As the Court of Appeals stated in *Virginia Petroleum Job Association* v. *Federal Power Commission,* 259 F. 2d 921 (4th Cir. 1958):

> "Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

The carriers faced no threat of irreparable damage upon effectuation of the Commission's order for the reason that a clear alternative was available to them. If upon cancellation of the increase tariffs, the carriers found a continuing need for added revenues,

they had only to file new tariffs. The Commission's order fixing September 12, 1966 as the compliance date, did not establish or prescribe a rate level. It simply directed cancellation of the increase tariffs. The carriers were and are free to file new tariffs, with rates at any levels they believe justifiable. This prerogative is given to the carriers by statute. Indeed, it is a coherent part of the regulatory plan. 49 U.S.C. 317 vests in the carriers the right to initiate rates and changes in rates by the act of filing new tariffs. Even the order of investigation, issued by the Commission in this proceeding, did not prevent the exercise of that statutory power *pendente lite*. In *Middlewest Motor Freight Bureau* v. *United States* (D.C. Minn. 4th Div., reprinted in Appendix D) the three-judge Court dissolved a temporary restraining order and denied interlocutory injunction. It found (App. D5):

> "That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates."

Carriers in the *Middlewest Case* invoked their privilege and published new increase tariffs within one month after cancellation of the Commission-proscribed tariffs. Although protested by shipper interests, the Commission permitted the new tariffs to become effective and ordered investigation. The revenue yield from the new tariffs was estimated to exceed the yield under the cancelled tariffs. Publication of the new tariffs shielded the carriers from pecuniary injury and

left untouched their right of review in the case pending before the Minnesota District Court which retains jurisdiction of the action.

That the case before the reviewing court is not rendered moot by compliance with the Commission's order of cancellation, and publication of new tariffs, was decided by the three-judge Court in *Consolidated Freightways* v. *United States* (W.D. Washington, N.D.) By its judgment, issued January 26, 1967, the Court ruled "plaintiffs' compliance with the order of the Commission will not render this appellate proceeding moot."

If, as in the *Middlewest Case,* the carriers here complied with the Commission's order and promptly filed new increase tariffs, it could scarcely be claimed that 28 U.S.C. 2284(3) or 5 U.S.C. 1009(d) should provide them with a second bastion against "irreparable" injury. That they have not followed this course, though they could have done so, does not better their claim to injunctive relief. The underlying reason for interlocutory restraint, when carriers are faced with a Commission order, is that the applicants for injunctive relief have no alternative, so that injury threatens to become irreparable. That is not the situation that faces the carriers here. Upon compliance with the Commission's cancellation order, the right to file new increase tariffs provides the carriers with a substantive alternative. This precludes a finding that they are in danger of irreparable injury should the Commission's order of cancellation become effective. In these circumstances, appellants suggest, neither temporary restraining order nor interlocutory injunction may properly be issued under authority of

28 U.S.C. 2284(3) or 5 U.S.C. 1009(d). With respect to the "status or rights" provision of 5 U.S.C. 1009(d), the status to be preserved is the posture of the litigants in relation to the effective rates, as it existed prior to the moment when one of the parties moved to change the rates. This was "the last, uncontested status which preceded the pending controversy" defined as the status quo in many cases. *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F. 2d 804 (9th Cir. 1963); certiorari denied, 375 U.S. 821; *I.C.C.* v. *Hudson Transportation*, 174 F. Supp. 373 (D.C. N.J. 1959). The "pending controversy" is not the action instituted by plaintiff carriers in the court below to set aside the Commission's order. The Court's role is solely that of an appellate tribunal constituted to review a controversy originating before the agency. The "pending controversy" is the contestation before the Commission and the "last uncontested status" is the rate situation as it existed immediately prior to the plaintiff carriers' action in publishing the increase tariffs. Publication of the increase tariffs by the carriers was the affirmative act which set in motion the processes of change. This is made unmistakably clear by the statute's organization of the ratemaking process. The carrier is given the privilege and the right of initiating rates and changes in rates. It is exercised by the act of publishing a tariff (48 U.S.C. 317). That this is the act which effects the significant change in status is confirmed by 49 U.S.C. 316(g). This section provides that "Whenever there shall be filed" a new rate, the Commission may enter on a hearing of its lawfulness. It adds: "at any hearing involving a change in rate . . ., the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable."

Here plaintiffs filed tariffs increasing the rates effective August 1, 1964. The Commission, after investigation, found that plaintiffs had failed to produce evidence requisite to discharge the statutory burden of proof and ordered cancellation of the tariffs by September 12, 1966. In the review proceeding before the Court, the status quo referred to in 5 U.S.C. 1009(d) is that status as it existed just prior to August 1, 1964 and not just prior to September 12, 1966. The Commission's order returned the carriers to their status and the rates as they stood prior to the filing of new tariffs by the carriers which precipitated the pending controversy. The rate situation just prior to August 1, 1964 was clearly "the last uncontested status which preceded the pending controversy."

As for the "rights" referred to in 5 U.S.C. 1009(d) these are clearly the shippers' rights to just and reasonable rates, guaranteed by the Interstate Commerce Act (49 U.S.C. 316(a), (b), (d), (g)). It is that status and those rights that the law looks to preserve. The action of the court below in restraining the Commission's order was, appellants suggest, neither necessary nor appropriate, under Section 5 U.S.C. 1009(d) to preserve status or rights pending conclusion of the review proceeding.

2. The Undecided Motions

The issues considered above were submitted to the three-judge Court by appellants' motion to dissolve the temporary restraining order. At about the same time, a number of alternative motions were submitted to the Court, designed to shield shippers from irreparable injury should an interlocutory injunction

be granted. Thus, appellants filed a motion to require a bond; a motion for an order to protect shippers and receivers of freight from irreparable loss should the Commission's order be found to have been wrongfully restrained; a motion to limit the restraint on the Commission's order so as to operate only with respect to the 15 carriers who were plaintiffs in the action and to leave unaffected the remainder of the 1400 tariff participants who sought neither review nor restraint of the Commission's order. Authoritative support for the relief sought by appellants' motions is found in *United States* v. *Morgan,* 313 U. S. 409, 413 (1941), a case in which the three-judge Court issued a temporary restraining order on condition that the challenged increases be impounded and paid into court. In *Southern Tank Lines* v. *United States (W. D. Kentucky, C. A. No. 5139)* the grant of a restraining order was conditioned on the posting of a bond. In a memorandum opinion, the District Judge stated:

> "Although the Court realizes that no mention of Bond appears in 28 United States Code, Section 2284, the Court finds as a matter of law that an equitable proceeding requesting such extraordinary remedy as a Restraining Order, by a party who alleges that he will receive the ultimate relief sought upon the final determination, requires of him, in equity and protection to all parties who may suffer, the execution of a bond for their benefit and protection."

It is noteworthy that 5 U.S.C. 1009 (d) does deal expressly with conditions to be imposed when a restraint is granted. It provides that process issued by the reviewing Court to postpone the effective date

of agency action shall be "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury." See also *Yakus* v. *United States,* 321 U. S. 414, 440-441 (1943).

None of the appellants' motions were ruled on by the Court below. Indeed, the District Court failed at any time to decide plaintiffs' application for an interlocutory injunction. This in itself contravened 28 U.S.C. 2284(4) which stipulates that an application for interlocutory injunction "shall be given precedence and assigned for a hearing at the earliest practicable date." Without ruling on the application for interlocutory injunction, the three-judge Court kept in force to January 5, 1967, when its decision on the merits was handed down, the temporary restraining order granted by a single judge on September 9, 1966. This operated to deprive appellants of the opportunity to know the grounds on which interlocutory relief was provided and the opportunity to appeal from continued restraint of the Commission's order.

In its handling of the temporary restraining order and the application for interlocutory injunction, the Court below pursued a course that appears in open conflict with decisions of other three-judge courts. See *Accelerated Transport-Pony Express* v. *United States,* 227 F. Supp. 815 (Vt. 1964); *Middlewest Motor Freight Bureau* v. *United States,* supra; *Consolidated Freightways* v. *United States,* supra. All were motor carrier general increase cases in which the Commission ordered tariffs cancelled. In all, the reviewing Courts dissolved temporary restraining

order or denied interlocutory injunction after weighing criteria such as those enumerated in *Virginia Petroleum Job Association* v. *Federal Power Commission*, supra. These included (1) the showing made by applicant of probable success of its appeal; (2) irreparable injury to the applicant; (3) serious adverse effect, through issuance of a stay, on other interested persons; (4) the public interest.

In the instant case, appellants sought by its motions, to invoke these well-settled principles governing grant or denial of restraint on Commission order. Pecuniary effect on shippers of the Court's action may be measured by carrier affidavits submitted in the instant case. Revenues accruing from the increases were estimated to total $29,267 per working day for only 15 of the 1400 carrier partcipants in the tariffs. This reflects as well the extent of the public's cost and the pecuniary impact on shippers of a restraint on the Commission's order that operates to permit the carriers to exact increased rates although found not shown to be just and reasonable. Adverse effect on others and the extent of public interest, if weighed, would surely have militated against the grant of a restraint without the protective condition sought by appellants.

3. Standards of Proof

The Court below appears to concede the Commission's power to set the standards of proof in general increase cases. Yet the Court deemed it "an obvious question", whether the quantum of proof adduced by the carriers in the present case was equal to the proof which the Commission in the past held to be sufficient.

(App. A4) The Court acknowledged (App. A11) that "the Commission is the sole judge of the weight of the evidence before it". But the Court displaced the Commission's evaluation of the worth of the evidence with its own. The Court declared that "the burden of proof is on carriers to show that a proposed rate increase is just and reasonable." (App. A4). But, the Commission's decision that the rate increases were not shown to be just and reasonable, was reversed by the Court on a record incapable of supporting findings that the rate increases were just and reasonable. The Court viewed the major difficulty with the Commission's report to be that the Commission's findings amount to "little more" than the conclusion that the carriers did not sustain their burden of proof (App. A11). But the burden of proof here is not the procedural rule of evidence that allocates burden of persuasion to the party with the affirmative of the issues. Burden of proof in this proceeding is a statutory mandate. 49 U. S. C. 316 (g) makes it the obligation of the carrier "at any hearing involving a change in a rate . . . to show that the proposed changed rate . . . is just and reasonable." This Congressional imperative can neither be evaded by the carriers nor disregarded by the Commission. Indeed, it is the statutory barrier that stands between the carrier's reach and the public purse.

The Commission's finding that plaintiffs' evidence could not suffice was based, not on a demand for evidence of a new type, but on the indispensable ingredient of any sample of some larger whole—that evidence (beyond mere assertion) be adduced to show that the carriers selected are representative of

all and the interval chosen is typical of the full period. Such evidence was totally lacking on the record. Entirely apart from any standards of proof, old or new, the cost and traffic studies to be worth anything at all towards the issues, had to be representative as to carriers and typical as to period. Nothing in the August 3rd order, or in the Commission's standards of proof, changed that. Thus, when the carriers made their study, whenever that was, the minimum requirement of probative utility had to be representativeness and typicality. What the Commission called for was evidence that the carriers selected were representative and the period chosen was typical. What it received were declarations and protestations. The Commission did not demand that the nature of the study be different from what it always was. It laid down no requirement of random sampling. It called for evidence to show that the selection that was made, whether by judgment sampling or by random sampling, was representative and typical. That evidence the carriers failed to supply. Their failure of proof is equally fatal under old standards and under new.

The ultimate paradox is found in a situation where the agency requires affirmative evidence to be sufficient to support affirmative findings, while the reviewing Court is satisfied to accept less. If the Court's view is allowed to prevail, the Commission has been deprived of the power to set standards of proof and the authority to weigh the evidence submitted. Nothing less than this power and authority will suffice if the Commission is to carry out its regulatory functions.

Conclusion

The questions presented on this appeal are substantial. Their resolution is urgently needed to delimit with greater clarity and all possible precision the boundaries of judicial review of agency action in the developing law of motor carrier rate regulation.

Respectfully submitted,

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Dated: May 12, 1967

APPENDIX A

Memorandum Opinion of District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 66–C–467

Jan. 5, 1967

RINGSBY TRUCK LINES, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

PORTLAND FREIGHT TRAFFIC ASSOCIATION, WEST COAST TRAFFIC COMMITTEE OF THE TOY MANUFACTURERS ASSOCIATION, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Intervening Defendants.

Before BREITENSTEIN, Circuit Judge, and ARRAJ and CHILSON, District Judges.

MEMORANDUM OPINION AND ORDER

ARRAJ, *District Judge.*

This action was instituted by fifteen motor carriers who seek to set aside, annul and enjoin a decision of the Interstate Commerce Commission, entered in

"Increased Class & Commodity Rates, Transcontinental", 326 I.C.C. 397 (1966). In that decision the Commission found that a three per cent rate increase in "transcontinental rates" which had been put into effect in 1964 by 1400 motor carriers had not been shown to be "just and reasonable". The rate increase was therefore canceled by the Commission's order dated April 15, 1966. A petition for reconsideration was denied, and the original order was modified so as not to become effective until September 12, 1966. On September 9, 1966 this Court entered a temporary restraining order preventing the Commission from canceling the rate increase; and on November 4, 1966, following a hearing on an application for an interlocutory or a permanent injunction, the Court ordered that the temporary restraining order remain in effect until final determination by the Court.

We are now prepared to dispose of the matter on the merits. This is a limited administrative review, governed by the terms of the Administrative Procedure Act, Title 5 U.S.C. § 1009, which essentially embodies the "substantial evidence" rule.

As evidence that their rate increase was "just and reasonable", the carriers had prepared traffic and cost studies, designed to reflect their expenses and revenue and need for an increase. The rate was published to go into effect on August 1, 1964. On August 3, 1964 the Commission entered an order requiring that the carriers seeking the increase submit detailed evidence and statistical data supporting their need for the increase.

For preparing the study, the carriers obtained traffic data from eighteen carriers for one week, which

included all bills dated June 19, 1963, and all bills dated June 16-18 and 20-22, 1963 for shipments with a billed weight of 10,000 pounds or more. The cost and traffic studies, and the underlying working papers were deposited with the Commission, and a hearing was held by a Hearing Examiner on November 30, 1964.

The evidence before the Examiner consisted of the studies themselves, testimony by verified statements from the expert transportation consultant who had prepared the study, and from various officials of the carrier companies involved in the increases, as well as verified statements of some protestants. There was also cross-examination of some of those witnesses who had submitted verified statements, including plaintiffs' transportation consultant.

The Hearing Examiner recommended to the Commission that the increase be approved. He specifically found that the study carriers were representative of the entire class affected, that the studies were in all respects proper, and that the carriers had demonstrated their need for additional revenue.

The Commission elected to investigate, rather than suspend, the rate increase, and on April 15, 1966 the Commission entered its report and order finding that the rate increase had not been shown to be just and reasonable and ordering that the rate be canceled. In the report the Commission concluded that the carriers had not sustained their burden of proof, and more specifically that the cost studies could not be given probative value because the carriers selected for the study had not been shown to be representative of the entire group, and the traffic sample (particu-

larly the period selected for the study) had not been shown to be statistically sound. Neither of these grounds had been raised by any of the protestants, who challenged the increase on different grounds.

It is quite clear that the burden of proof is on carriers to show that a proposed rate increase is "just and reasonable", see, e. g., *Accelerated Transport-Pony Express, Inc.*, v. *United States*, 227 F.Supp. 815 (D. Vermont 1964), and, of course, cost studies constitute a necessary ingredient of the proof needed to sustain that burden. The carriers here, however, contend that the evidence adduced by them was in all respects the same type and degree of evidence which has in the past been held to be sufficient to carry the burden of proof in motor carrier rate increase cases. They argue that in holding that the carriers have not met their burden, the Commission is apparently applying new and different standards of proof of which the carriers were not sufficiently apprised.

Certainly when carriers appear before the Commission, they are entitled to know by what standards they are going to be judged. This Court has recognized this basic principle, *Eddleman* v. *United States*, 229 F.Supp. 231 (1964), and indeed the Commission itself has said that "in fairness, standards should not be changed without due notice." *General Increases—Transcontinental*, 319 I.C.C. 792, 803 (1963). See also, *E. Brooke Matlack, Inc.*, v. *United States*, 119 F.Supp. 617 (E.D. Pa. 1954).

An obvious question is whether the quantum of proof adduced by the carriers in the present case was, as they contend, equal to the proof which the Com-

mission has in the past held to be sufficient. The evidence offered to establish that the carriers selected for the study were representative of the entire class of carriers affected by the rate increase consisted of the opinion of the transportation consultant who prepared the study, and the statements of officials of the various companies. On cross-examination the transportation expert explained why he selected the study carriers:

> Yes, one of the peculiarities of the transcontinental traffic is that there are a relatively small number of truck line carriers who participate in the vast majority of the transcontinental traffic. There may be many carriers who originate the traffic and other carriers that terminate it, but these carriers perform the principal transcontinental transportation. In a traffic study of the type here designed since the study carriers reported all of their bills, not merely the traffic they originated, we picked up in the traffic study all of the shipments originated by connections in the East or the West and given to these carriers and all of the traffic which these carriers gave to connections with the East and West for determination. By working with a numerically small group of carriers it was possible to make a comprehensive survey of the entire transcontinental traffic. (Transcript, pp. 60-61).
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> * * * *
>
> I used the term representative in the sense of a group of carriers whose traffic would produce a substantial picture of the transportation char-

acteristics of the transcontinental traffic (Transcript p. 62).

It does appear that in the past the Commission has required no more as evidence of the representatives of the carriers employed in a cost study than the considered judgment of an expert witness. See, e. g., *Cheese Food from Detroit Lakes to Kansas City,* 306 I.C.C. 295 (1959); and *Middle Atlantic Conference* v. *A.A.A. Trucking Corp.,* 302 I.C.C. 499, 510-511 (1957).

While the opinion of an expert need not be accepted as conclusive evidence by the Commission, it is significant that in the present case there was absolutely no countervailing evidence on the question of the representativeness of the carriers selected for the study. In *Davis & Randall, Inc.,* v. *United States,* 219 F.Supp. 673, 678 (W.D. N.Y. 1963), Circuit Judge Friendly disapproved the Commission's view that "even in a proceeding where there is no adversary, it is always free to disregard expert testimony offered by the proponent without communicating its criticisms before decision, so long as it does not rely on 'facts' outside the record." He further noted that:

> Somehow it does not seem consistent with the policy underlying the APA that an agency should be able to reject such testimony on the basis of arguments which the expert never heard and which he might well have been able to answer. Id. at 678-679.

The report of the Commission in the present case contained no finding that the expert witness had been

disbelieved. Therefore, it does appear on the face of it that the Commission has changed its required standards of proof in this regard.

As the carriers point out, for the Commission to conclude that these study carriers are not representative is to some extent to contradict some of their prior holdings, in which most of these same carriers were employed in cost studies. See, e. g., *Transcontinental Motor Rates—Increases,* 49 M.C.C. 211 (1949), *Transcontinental and Rocky Mountain Increases,* 54 M.C.C. 377 (1952); *Transcontinental and Western Increases, 1952,* 61 M.C.C. 755 (1953), *Increases, Transcontinental—Intermountain Coast,* 304 I.C.C. 15 (1958), and *General Increases—Transcontinental,* 319 I.C.C. 792 (1963). The carriers also point to the fact that eight of the eighteen carriers in the present cost study had also been used in a recent study by the Commission itself; this fact also seemed persuasive to the Hearing Examiner. (Hearing Examiner's report, p. 5). The Commission stated, however, that "the inclusion of the additional carriers may or may not distort the picture", 326 I.C.C. at 405; this fact was therefore not impressive with the Commission. It is interesting to note that the Commission *has* in the past pointed to such a fact as evidence of representativeness. See *General Increases—Eastern Central Territory,* 316 I.C.C. 467, 471 (1962). All of these factors suggest that the evidence adduced by the carriers in support of their selection of representative carriers for the study was substantially the same as the evidence which has in the past been held to be sufficient.

The Commission's other ultimate finding was that

the carriers had not demonstrated that the period used for the study was typical for a full year's operation. As previously noted, for the purposes of the study, the eighteen study carriers compiled data for one week, including all bills dated June 19, 1963, and all bills dated June 16-18 and 20-22, 1963 for shipments having a billed weight of 10,000 pounds or more. As to his reason for selecting this period, the expert testified on cross-examination: "The dates selected in June were the earliest possible dates for which the carriers could organize themselves to provide the required data. A week was taken in the middle of June to avoid peaks in traffic. * * *" In his verified statement the expert stated that he felt that the period was representative, and numerous officials of the carrier companies testified that the period was surprisingly typical or normal for their companies.

The Commission has in the past upheld studies in which the period of the study was as short or shorter than that in the present case. See, e. g., *Transcontinental and Rocky Mountain Increases,* 54 M.C.C. 377 (1952); and *Transcontinental Motor Rates—Increases,* 49 M.C.C. 211 (1949). A particularly apposite case is *General Increases—Eastern Central Territory,* 316 I.C.C. 467, 471 (1962), in which the period of the study was quite similar to that in this case. When the representativeness of the period was assailed by protestants, the Commission stated:

> The shippers contend that the sample is not representative of the consist of the total traffic of respondents, and indicate a preference for other sampling methods. The type of sample

> used herein has been found acceptable in numerous prior proceedings. It is clear that the respondents did not choose a particular day or period with a view toward obtaining the result most favorable to their position. * * * The criticism of the sample as such is without merit.

The study before the Commission in that case "was based on all less-than-truckload shipments billed on May 25, 1960, and on all truckload shipments billed on for the 5 day workweek beginning May 23, 1960." The traffic sample in that case was therefore strikingly similar to the sample in the case at bar. There is certainly no evidence in the present record that the carriers chose "a particular day or period with a view toward obtaining the result most favorable." Nonetheless, the Commission concluded that: "The respondents (sic) contention that the period selected is a representative period of time is simply conjecture and begs the real question of establishing this fact." 326 I.C.C. at 405-406. Again it appears that the Commission has departed from the standard of proof which it required in earlier cases. If the carriers have in fact failed to come forth with the amount and types of proof which have *always* been required of carriers seeking a rate increase, the Commission has certainly failed to point out specifically in what respects they fell short.

The carriers contend that this holding of the Commission mirrors not only the Commission's recent dissatisfaction with the long-used method of compiling cost data, but also an insistence that a completely new system of sampling, called random or probability

sampling, be used. We are not prepared to draw such a conclusion from a reading of the Commission's opinion, but if this is, in fact, the unexpressed basis for the Commission's holding, it is quite clear that this would constitute such a radical departure from its former standards that detailed notice should have been given to the carriers.

A report and order of the Commission dated September 29, 1966 and entitled "Motor Carrier Probability Sampling Studies" is a part of the record before us. This report *does* give notice to the carriers that probability sampling methods should be used for future studies, and the Commission itself recognizes the need for giving adequate notice: "[W]e consider the introduction of probability sampling in the preparation of such special reports to be an innovation of such importance as to justify a reasonably comprehensive report * * *." (at p. 4).

If the Commission's preference for this sampling method was the underlying rationale of the Commission's holding in the instant case, it cannot be sustained, for proper notice was not afforded.

> That the Interstate Commerce Commission has the right from time to time to change its policies cannot be questioned. * * * However, where, as here, an applicant relying in good faith upon previously determined standards, as expressed in previous written statements or conclusions of the agencies, acts in strict accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency deter-

mines upon new and perhaps more sensitive standards. *E. Brooke Matlack, Inc.*, v. *United States,* 119 F.Supp. 617, 622 (E.D. Pa. 1954).

Defendants place considerable emphasis on the August 3, 1964 order of the Commission in which it was stated that the respondents would be required to submit "detailed data to establish the representative nature of the carriers used". If the Commission's decision was based on a finding that the carriers had not complied with this order, that fact is certainly not readily apparent from a reading of the Commission's report. Significantly, neither the Commission in its opinion, nor the defendants in their argument have suggested what might constitute such "detailed data". It is interesting to observe that in its recent report on the "Motor Carrier Probability Sampling Studies", mentioned supra, the Commission discussed the method of selecting representative carriers for the cost studies, and concluded that "we can find no justification for changing the previously used standards for selecting carriers to participate in the special studies." (p. 16). It appears, therefore, that even the Commission knows of no improved standard for selecting the representative carriers; and under the previously used standard, the selection is left to the informed judgment of the expert preparing the study.

The major difficulty which we encounter in reviewing the opinion of the Commission under the "substantial evidence" rule is that the Commission's findings amount to little more than the conclusion that the carriers did not sustain their burden of proof. It is, of course, true that the Commission is the sole

judge of the weight of the evidence before it, "[b]ut where, as here, the carrier has presented impressive evidence to support the proposed rate, the Commission may not hold the rate unlawful upon the mere statement that the carriers have not sustained their burden of persuasion." *New York Central R. Co.* v. *United States,* 99 F.Supp. 394, 401 (D. Mass. 1951).

> "[W]here, as here, the ultimate finding is negative in form, it need be supported only by 'sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds' for holding that burden has not been met." *Chicago & E.I.R.* v. *United States,* 107 F.Supp. 118, 125 (S.D. Ind. 1952), aff'd., 344 U.S. 917, 73 S.Ct. 346, 97 L.Ed. 707 (1952).

The question then is whether the Commission's opinion contains "sufficient basic findings of fact." In concluding that the carriers had not shown the study carriers to be representative of the entire class, the Commission observed that only twelve of the eighteen carriers were shown to have been participating in transcontinental traffic. (p. 405). There was actual evidence by twelve carriers as to what percentage of their total traffic is transcontinental, and the remaining six all had extensive transcontinental rights. The cost study itself took into account the relative participation of each carrier in transcontinental traffic, which presupposes, of course, that all of the carriers were to some extent operating in that traffic. As the carriers point out, the obvious reason why there was no testimonial evidence as to the six

carriers was that they were not asked the question on cross-examination. It was also pointed out that three of these six carriers participated in the Commission's own study; in other words, this observation by the Commission does not afford a "rational ground" for its decision.

The Commission also emphasized the fact that only seven per cent of the total traffic participated in by one of the carriers was transcontinental. This factor is certainly *not* particularly relevant, however, in view of the fact that the studies were *weighted* so as properly to take into account the greater or lesser degree of participation by each study carrier. This is clear from the verified statement of the transportation consultant, and this fact seems to have been recognized at one point by the Commission. (Appendix to the report, 326 I.C.C. at 410).

It is therefore apparent that the findings and reasoning of the Commission are insufficient to justify its holding. Yet it is fundamental that the Commission must " 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962). The report of the Commission simply fails to "articulate any rational connection between the facts found and the choice made", *Burlington Truck Lines, Inc.,* supra, and the matter should therefore be remanded to the Commission for further findings.

A remand is necessary because the Court is unable to determine the real reasons for the Commission's holding—whether the Commission actually

changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. Upon remand the Commission should explain with some detail exactly how the carriers failed to prove their case, and what standards are being applied. Similarly if the Commission concludes that the carriers did not disclose sufficient detailed data, it should explain what type of data it is requiring. If the Commission requires more evidence upon remand, it can, of course, receive it. In any case, if the Commission has no more rationale for its decision than what is contained in its original report and order in 326 I.C.C. 397, this Court cannot affirm.

It is therefore ordered that the Commission's order of April 15, 1966 as modified on July 26, 1966, be vacated and set aside and that this matter be remanded to the Commission for further proceedings in conformity with this opinion.

Served May 9, 1966

30316

INTERSTATE COMMERCE COMMISSION

NO. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

Decided April 15, 1966

Increased transcontinental motor common-carrier class and commodity rates and charges found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

LeGrande A. Carlston and *Z. L. Pearson, Jr.*, for respondents.
A. R. Allen, V. A. Bordelon, Dan T. Costello, Frank E. Larwood, Charles C. Miller, A. E. Norrbom, and *Robert J. Stoll*, for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WALRATH, AND BROWN

FREAS, *Commissioner:*

By schedules which became effective on August 1, 1964, the motor common-carrier respondents, parties to tariffs[1] published by the Rocky Mountain Motor Bureau, Inc., hereinafter called the Bureau, established a general 3 percent increase in their transcontinental[2] rates and charges. Excepted from the territorial application of the general increase are (1) rates and charges between points in southern California (south of a southeasterly line from a point north of Los Angeles to the California-Arizona State line), Arizona (except Fredonia, Glen Canyon Dam Site, Littlefield, and Page), and western New Mexico, on the one hand, and on the other, points in Arkansas, Oklahoma, Texas, most of Louisiana, and certain points in Mississippi, eastern New Mexico,

[1] M.F.-I.C.C. Nos. 98, 116, 117, 119, and 135.

[2] The transcontinental rates and charges apply between points lying east and west of a line beginning at El Paso, Tex., and extending northward along U. S. Highway 85 through Albuquerque, N. Mex., Pueblo and Denver, Colo., to Cheyenne, Wyo., thence along U. S. Highway 87 through Casper, Wyo., to the Wyoming-Montana State line, thence along that line to the Wyoming-South Dakota State line, thence northward along the State lines between Montana on the west and South Dakota and North Dakota on the east to the Canadian border.

and Tennessee, and (2) rates and charges between points in southern California and Arizona, on the one hand, and on the other, certain points in Illinois and Missouri, principally Chicago, Ill., and St. Louis, Mo. The first exception is a general exception for all participating carriers. It is occasioned by the refusal of Braswell Freight Lines, Inc., and Braswell Motor Freight Lines, Inc., which serve those areas, to concur in the increase. The second exception is the result of independent action by Braswell Freight Lines, Inc., Braswell Freight Lines, Inc., operator of Warren G. Shayler, W. Thurmond Shayler, Guardian, (Clarinda K. Shayler, Executrix), and Braswell Motor Freight Lines, Inc., to the extent that the transportation moves over the Braswell-Shayler routes. Upon protest of various parties,[3] division 2, acting as an appellate division, by order of July 31, 1964, instituted an investigation without suspension into the lawfulness of such schedules, or as the same may be amended or reissued.

A history of the transcontinental motor carrier rates is briefly summarized in *General Increase-Transcontinental*, 319 I. C. C. 792 (1963). In that proceeding a 6-percent general increase in transcontinental rates and charges established October 15, 1960, except on commodity rates, minimum 10,000 pounds or more, and subject to the same territorial exception as described in (1) above, was approved. mexcept for a general increase in minimum charges per shipment, which became effective November 17, 1962, as amended March 9, 1963,[4] that was the last general increase in the respondents' transcontinental rates and charges. In *General Increase-Transcontinental, supra*, and other proceedings,[5] the Commission noted the recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs. It recognized the weakness of this criterion without a showing of the factors that make up such ratios in light of the changing patterns of motor carrier operations, particularly with respect to carrier-affiliate relationships and transactions and other related matters. Responsive thereto, the Commission indicated that in future

[3] Los Angeles Chamber of Commerce, Portland Freight Traffic Association, Northern California Ports and Terminals Bureau, Inc., West Coast Traffic Committee of the Toy Manufacturers Association, San Francisco Chamber of Commerce, and Oakland Chamber of Commerce.

[4] See Docket No. 34182, *Minimum Charges-Transcontinental Territory*, in which an examiner's recommended report and order approving the increase was affirmed and adopted by order of division 2, dated May 1, 1964.

[5] *General Increase-Middle Atlantic and New England Territories*, 319 I.C.C. 188, decided March 20, 1963, and *General Increases-Eastern-Central Territory*, 316 I.C.C. 467, decided June 14, 1962.

general-increase proceedings where operating ratios are so utilized more detailed evidence and supporting data of the expense items of representative carriers will be expected, and that the studies to be made should reflect the revenues and expenses and and their relationship to the specific traffic on which the increases are to apply.

In the instant proceeding, in order that consideration be given to all such factors whih may bear upon a proper consideration of the lawfulness of the 3-percent increase, the respondents, in the discharge of their burden of proof, were called upon by order of the Commission, August 3, 1964, to include the information and supporting data specified therein, a summary of which is set forth in the appendix, part I. The order further provided for the submission of the direct evidence of the parties in the form of verified statements, with oral hearing for cross-examination and rebuttal.

Evidence supporting the 3-percent increase was submitted by 18[6] motor carrier respondents, listed together with other data in the appendix, part II, certain of which, as indicated therein, have substantial transcontinental operations. Costs were developed by a transportation cost analyst for the respondents. The protestants did not submit cost data. Their principal concern is with the rate differentials enjoyed by shippers located in the territories which were excepted from the increase under rates accorded shippers in the remaining areas. The protestants contend that the increased rates are unjustly discriminatory and unduly preferential and prejudicial in violation of section 216(d) of the Interstate Commerce Act. The Portland Freight Traffic Association and the West Coast Traffic Committee Toy Manufacturers Association also contend that the respondents have not justified the increase. The latter contends that the increase is excessive.

Financial condition of the carriers.—There are approximately 1,400 motor carriers participating in the schedules embracing the 3-percent increase, of which some 821 are class I or class II carriers. The aggregate operating revenues of the class I and class II carriers for the year 1962 and 1963, and for the first

[6] Originally, 28 member carriers of the Bureau were selected so as to include those engaged not only in transcontinental traffic but also inter-mountain coastal, and Rocky Mountain traffic. The elimination of some of these carriers as not being important carriers of transcontinental traffic and the refusal of the two Braswell companies to participate in the study reduced the number of study carriers to 18. Upon the merger of Gillette Motor Transport, Inc., with Western Truck Lines, Ltd., now Western-Gillette, Inc., the number was subsequently reduced to 17 carriers.

six months of 1964 are shown as $3,464,583,589, $3,672,811,423, and $1,857,607,090, respectively, with corresponding aggregate expenses of $3,316,434,507, $3,520,704,682, and $1,775,183,355. Their composite weighted operating ratios before income taxes for the respective periods were 95.7, 95.9, and 95.6 percent. The operating ratios after income taxes were 97.2 percent for both 1962 and 1963. In the absence of complete data for 1964, a comparison of the first six months thereof with the corresponding period for 1963 indicates that the operating ratio at mid-year 1964 slightly improved from 96.5 to 95.6. These ratios are illustrated in greater detail in the appendix, part III. As indicated in the appendix, part II, the weighted average operating ratios of the study carriers in 1962 were 95.3 before income taxes and 96.5 after income taxes. In 1963 the corresponding ratios were 95.1 and 96.4, respectively. Also illustrated in the appendix, part IV, in accordance with the Commission's order, are certain other ratios relating to the financial condition of the study carriers as compiled from their 1963 annual reports. For this group as a whole the ratios were as follows:

	Ratio Percent
1. Ratios of net income to net worth (assets minus liabilities)	
a. Before income taxes	16.32
b. After income taxes	10.89
2. Ratio of net carrier operating income to total carrier operating revenues	4.89
3. Ratios of net income before and after income taxes to total carrier operating revenue	
a. Before income taxes	4.03
b. After income taxes	2.69
4. Ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus liabilities)	15.05
5. Ratios of net income before and after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)	
a. Before income taxes	12.39
b. After income taxes	8.27

Since the publication of the latest previous general increase in their transcontinental rates in 1960 the respondents have been faced with increased operating costs. This is particularly true of labor costs (wage and benefits payments) as a result of new labor contracts covering line-haul and pickup and delivery drivers, terminal, dock, office, and maintenance employees. These contracts became effective February 1, 1964 in 24 central and southern States and July 1, 1964 in 11 western States for a three-year period through 1966. These costs are scaled to become increasingly higher each succeeding year. For example, the projected labor costs of five[7] of the study carriers, for 1964, range from 3.5 to 6.5 percent higher than in 1963. Denver-Chicago indicates that its total increased labor costs projected to year-end 1965 level would be 3.5 percent higher than in 1964. In 1966 the increase would be about 4 percent over 1965. Illinois-California indicates that its total increased labor costs projected to year-end 1965 and 1966 levels would be 7.5 and 11.4 percent, respectively, over 1963. Stressing the impact of additional labor costs, a number[8] of the study carriers point out that such expenses amount to 50 percent or more of their total operating costs and in two instances approximated 57 percent of the carriers' total revenues.

Further testimony of a number of responsible officials of the study carriers is descriptive of management's continuing programs of cost control, replacement of obsolete equipment, and the improvement of facilities to meet the rising costs of operations. The development and improvement for greater efficiency in communications and billing, radio dispatching of pickup and delivery vehicles and the use of electronic data processing equipment, among others, is constantly under management study. In certain instances, for example, multiple terminals have been combined within a single city for improved terminal services, maintenance of equipment, and accounting procedures. With the institution of so-called "doubles-operations" transcontinentally, where warranted, the result is a reduction of expenses and increased payloads. The extent to which such programs

[7]Denver-Chicago Trucking Company, Inc., Garrett Freight Lines, Inc., Illinois-California Express, Inc., United Buckingham Freight Lines, and Watson-Wilson Transportation System, Inc.

[8]Denver-Chicago Trucking Company, Inc., Garrett Freight Lines, Inc., Transcon Lines, and United Buckingham Freight Lines. In the case of Illinois-California Express, Inc., and Consolidated Freightways Corporation of Delaware, the ratio, as indicated, is with respect to their total revenues.

have been implemented by the carriers, generally, is determined by the character and the particular needs of the individual carrier's operation. However, according to the respondents, these and other efforts to increase the operating efficiencies and thereby reduce expenses have not been wholly sufficient to offset the rising costs of operations.

Cost and traffic data.—In ascertaining revenues and expenses to demonstrate the need for the additional revenue provided by the general increase, the respondents developed out of pocket service unit costs for 1963 by updating the unit costs contained in public statement No. 7-60,[9] through the application of the Highway Form B formula to the 1963 annual reports of the study carriers. Traffic data was obtained from surveys simultaneously conducted by the study carriers, for one week, which included all bills dated June 19, 1963 and in addition all bills dated June 16-18 and 20-22, 1963 for shipments having billed weight of 10,000 pounds or more. Each shipment was recorded and tabulated separately by territory with further breakdown as to weight group and type of handling. For the various categories the tabulation revealed the number of shipments, weight (actual and billed), through revenues, reporting carrier's revenue, through hundredweight-miles, and reporting carrier's hundredweight-miles. Service unit and expenses for each carrier were assigned by weight bracket to transcontinental and other traffic in relationship to their participation therein. The accumulation of service units and expenses assigned to transcontinental traffic for all of the study carriers allowed for the development of weighted average unit costs. To permit the trending of these costs to the 1964-level, the study carriers furnished a restatement of their labor costs to reflect the impact on the actual 1963 costs of the contractual and contract related increases known to become effective at year-end 1963, as well as estimates of increases and decreases in other expenses as of the end of such period.

On this basis, respondents compute operating ratios on transcontinental traffic, before income taxes, of 96.2 percent at revenue and expense levels for 1963, and 99.1 percent at the year-end 1964 expense level. A summary follows:

[9] Entitled "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities Performing Transcontinental Service, 1959," prepared by our Cost Finding Section, based on data provided by 8 of the study respondents, as follows: Consolidated Freightways Corporation of Delaware, Denver-Chicago Trucking Company, Inc., Illinois-California Express, Inc., I.M.L. Freight, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Ringsby Truck Lines, Inc., and Transcon Lines.

	Revenues		Expenses
1963	$4,669,515	$4,492,462	96.2 percent
1964	$4,669,515 (at 1963-level)	$4,626,786	99.1 percent
	$4,809,600 (increased 3 percent)	$4,626,786	96.2 percent

A comparison of the out-of-pocket service unit costs so developed at the 1963 level, with the same 1959 unit costs updated by our Cost Finding Section as reported in public statement No. 7-64,[10] reveals that both studies show appreciable increases in the unit service costs since the latest previous general increase in respondents' transcontinental rates and charges. The cost study, as analyzed and discussed by the examiner, is summarized in the appendix, part V.

Affiliates.—To illustrate the financial effect of transactions between the study carriers and their affiliates on the operating expenses of the former, the respondents submitted a summary analysis, set out in the appendix, part VI, of affiliate operations during 1963 by the fifteen study carriers having affiliates. The profits of the affiliates were treated as a reduction in the operating expenses of the carriers involved, in the same ratio that payments by the carrier to its affiliates have to the total business of the latter. The effect of the affiliate transaction on the expenses of the carriers is such as to change the composite weighted operating ratio, before income taxes, of the study carriers from 95.1 percent before adjustment for affiliated company transactions to 94.4 percent after such adjustment, a reduction of .7 of one percent.

As pointed out in the recommended report, most of the opposition to the increase stems from the exclusion of the Southern California-southwestern territory areas from the application of the increase, considered necessary under the competitive circumstances. Because of the competition, the examiner found such exclusion not unlawful. *General Increases-Transcontinental, supra.* The examiner concluded that the study carriers were fairly representative of the transcontinental carriers. The examiner further concluded that the average operating ratios of the study carriers for 1963, as shown in the appendix, part II, needed improvement; and that their dealings with affiliates are not the cause of their adverse operating ratios. Ultimately concluding that the respondents established a prima facie showing that the

[10] Entitled "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities by Regions or Territories for the Year 1963."

increase is reasonable in the circumstances, the examiner found that the 3-percent general increase will not result in rates and charges in excess of the maximum reasonable level, and that they are not otherwise unlawful.

On exceptions, protestants Portland Freight Traffic Association and the Northern California Ports and Terminals Bureau, Inc., in effect, renew their allegations that the increase is unjust and unreasonable in view of the excluded territories and results in undue preference and prejudice. As hereinafter indicated, our findings differ from those of the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Discussion and conclusions.—No exceptions are taken to the hearing examiner's finding regarding the respondents' cost study which we find to be correct in all material respects. As indicated in the appendix, part IV, unit costs have increased since the last general increase in the rates on transcontinental traffic. However, this fact standing alone is of no significance here. The unit costs must necessarily be applied to a representative sample of the considered traffic in order to determine the revenue needs of the carriers.

As noted, respondents' justification for the general increase rests primarily on a showing of the revenues and expenses, as summarized above, relating to the transcontinental traffic of the study carriers which conducted the traffic surveys and from which operating ratios were computed. Based on this evidence, the respondents conclude that the general increase would reduce the average weighted operating ratio of the study carriers from 99.1 to 96.2 percent at the year-end 1964 revenue and expense levels.

Of controlling importance in this proceeding are whether the carriers selected are shown to be representative and the statistical worth of the traffic sample. When selected carriers are used as a basis for a showing of revenue needs for all respondents, competent testimony must be produced to establish that they are typical of the group as a whole. *Cf., Atchison, T. & S. F. R. Co.* v. *United States*, 225 F. Supp. 584 (D. C. Colo. 1964), and *New York Central R. Co.* v. *United States*, 199 F. Supp. 955 (S. D. N. Y. 1961). Here the respondents have used 18 (now 17) motor carriers claimed to be a representative group, presumably, of about 1,400 motor carriers that participate in transcontinental tariffs. In support of this position, the respondents stress the

fact that 8 of the study carriers were used by the Commission's Cost Finding Section in preparing public statement No. 7-60. However, this does not warrant the finding that the study carriers as a group are typical of transcontinental carriers. While the 8 carriers may be representative of transcontinental carriers, the inclusion of the additional carriers may or may not distort the picture. They also rely on the individual study carriers' participation in transcontinental traffic which, in the case of some carriers, has been described as comprising a substantial share of their respective total traffic. However, participating in the instant traffic has been shown for only 12 of the 18 study carriers. In one of the 12 instances, transcontinental traffic is shown to constitute only 7 percent of the carrier's total traffic. As to the study carriers whose participation in this traffic has not been disclosed, their representativeness is predicated on the fact that all of them, except one, have extensive operating rights between eastern and western transcontinental territory. However, this is not an acceptable substitute for evidence as to traffic movements. Moreover, although the evidence indicates that some of the study carriers transport a substantial quantity of transcontinental traffic, there is no showing as to what proportion of the total transcontinental motor carrier traffic is handled by the study carriers. Clearly, their selection has been indiscriminate. No properly designed method was utilized to select a group of carriers which would be truly representative of all respondents. Because of the lack of evidence in this regard, we must conclude that the respondents have not shown that the 18 study carriers selected are representative.

As indicated, the respondents' traffic data is the result of studies made for one week in June 1963 for shipments of 10,000 pounds or more and one day of the same week for less-than-truckload traffic. On May 27, and 28, 1963, the respondents agreed that the dates selected in June were the earliest days for which the carriers could organize themselves to provide the data. The middle week in June was selected to avoid peaks in traffic. This situation is analogous to those in *L.T.L. Class Rates & Minimum Charges-Midwest & Central*, 325 I.C.C. 106, 111 (1965), and in *Increased Rates, Southwest, Colorado, Wyoming*, 326 I.C.C. 216 (1966), where similar traffic studies were found not to be statistically sound. The same conclusion is warranted here. There is no showing here that the period selected is typical for a full year's operation. The respondents contention that the

period selected is a representative period of time is simply conjecture and begs the real question of establishing this fact. No concerted effort was made to use sampling techniques or to develop data in some other objective manner which if properly designed would have given the proper weight to all the various factors influencing traffic and costs. Lacking any objective evidence in this regard, we are compelled to find that the data obtained from the traffic studies is not statistically sound and of little probative value. In these circumstances, even if we were to assume *arguendo* that the study carriers selected were representative, the respondents' evidence would not warrant the conclusion that the 3-percent increase is just and reasonable.

Moreover, as shown in the appendix, part IV, the respondents introduced various ratios relating to the financial condition of the study carriers. For example, this evidence shows that the average ratio of net income before income taxes ($21,860,806) to the total net worth of the study carriers ($133,920,698)[11] is 16.32 percent. The corresponding ratio of net income after income taxes ($14,582,987) to the net worth is 10.89 percent.

It is not our intention to require carriers to maintain rates at the lowest possible level. On the contrary, we recognize that such action would not be in accord with the objectives of the national transportation policy. Nevertheless, in situations where, as here, carriers are seeking a general increase in their rates the statutory burden is upon them to establish a revenue need for such increase through the presentation of competent and substantial evidence. As indicated, a careful review of the record herein shows that the respondents have failed to meet this burden. In view of our findings herein, we need not consider the contentions of the protestants that the 3-percent general increase is otherwise unlawful.

We find the 3-percent general increase not shown to be just and reasonable.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before June, 1966, the schedules described in the order entered on July 31, 1964, by the Commission, Division 2, acting as an Appellate Division, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

[11] Computed by deducting current liabilities from current assets.

And it is further ordered, That this proceeding be, and it is hereby denied.

By the Commission, division 2.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX—PART I

Summary of required information and supporting data specified in order of August 3, 1964

The information and supporting data shall include, among other things, actual cost and revenue data and operating ratios specifically related to the traffic and territories involved, overall operating ratios, detailed data to establish the representative nature of the carriers used, and detailed data to disclose carrier-affiliate financial and operating relationships and transactions, and in addition all pertinent evidence and supporting data for the individual representative carriers regarding, but not limited to, the following as they relate to their overall operations and to those specifically relating to the traffic and territories involved:

(1) Ratios of net income before and after income taxes to net worth (assets minus liabilities),

(2) Ratio of net carrier operating income to total carrier operating revenues,

(3) Ratios of net income before and after income taxes to total carrier operating revenues,

(4) Ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus current liabilities),

(5) Ratios of net income before and after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities);

The detailed data regarding carrier-affiliate financial and operating relationships and transactions shall include, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, the following information:

1. Name of each affiliate from which respondent, during the year 1963, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.

2. Kinds of property or service which each affiliate supplied to respondent.

3. Basis of charges for property or services supplied by affiliate to respondent, including the base and rate for rental charges.

4. Total charges by each affiliate to respondent during year 1963 for:

a. Lease of vehicles.

b. Lease of terminals.

c. Lease of other property.

d. Pickup and delivery of shipments.

e. Repair and servicing of vehicles.

f. Management, accounting, financial, legal, purchasing or traffic solicitation services.

g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from services through transactions with persons other than respondent, the percentage of the revenue of such business to the total revenue of the affiliate in the year 1963 shall be indicated.

6. A copy of the income statements of each affiliate for the year 1963 and the latest period of 1964 for which a statement is available.

7. A statement listing the amounts of wages, salaries, bonuses, and other compensation paid by the affiliate in 1963 to any individual who is also a respondent or an officer, director, or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director, or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:

a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.

b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.

c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the wife or close relative either of an officer, director, or substantial stockholder of a respondent.

d. Any corporation which exercises control over the operations or finances of respondent.

The traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound;

All of the required data specified shall be based upon and reflect at least the most recent annual reporting period.

Operating data of selected carriers for 1963 and 1963

Carriers (1)	Percentage ratio—transcontinental traffic to total traffic (2)	The Year 1962					The Year 1963				
		Revenues (3)	Expenses (4)	Ratio before income taxes (5)	Income taxes (6)	Ratio after income taxes (7)	Revenues (8)	Expenses (9)	Ratio before income taxes (10)	Income taxes (11)	Ratio after income taxes (12)
Browning Freight Lines, Inc	7	$118,567	$706,726	96.8	$960	96.4	$735,855	$730,390	99.3	$(5,696)	98.5
Consolidated Freightways Corp. of Del	45	85,330,578	84,469,534	99.0	(1,556,099)	97.2	117,433,140	116,881,531	99.7	(502,200)	98.3
Denver Chicago Trucking Company, Inc		43,965,561	40,376,853	91.8	1,506,060	95.3	45,150,366	41,051,217	90.9	1,597,911	94.7
Garrett Freightlines, Inc	20	31,150,614	29,136,409	93.5	674,155	95.7	33,748,695	31,633,115	93.7	851,616	96.2
Gillette Motor Transport, Inc*		8,002,804	7,849,101	94.2	(22,487)	94.0	8,185,500	7,741,780	94.6	15,525	94.6
Illinois-California Express, Inc	60	27,428,803	25,439,683	92.7	703,166	95.3	29,304,651	27,941,604	95.3	640,000	97.5
JML Freight, Inc		36,270,106	33,323,000	88.8	1,307,884	93.5	32,290,346	29,996,986	92.9	1,075,333	96.2
Milne Truck Lines, Inc		6,202,144	5,794,375	93.4	152,196	95.9	6,726,953	6,423,063	95.6	117,017	97.4
Navajo Freight Lines, Inc		50,244,634	28,321,040	96.9	13,000	97.0	30,497,417	29,286,426	96.4	(946,121)	93.3
Pacific Intermountain Express Co	50	65,622,771	61,708,444	94.0	1,208,204	95.8	68,036,327	64,696,407	95.1	500,350	95.8
Ringsby Truck Lines, Inc	50	20,776,072	19,268,656	93.4	509,000	95.8	21,650,967	20,708,069	95.6	447,000	97.7
Rio Grande Motor Way, Inc	20	4,472,212	4,421,975	98.9	1,192	98.9	6,184,954	6,071,538	98.3	53,206	99.0
Texas-Arizona Motor Freight, Inc	50	7,078,621	6,799,649	96.0	162,962	98.3	7,314,355	7,065,056	96.6	53,684	97.7
T.I.M.E. Freight, Inc	34	19,360,790	17,540,081	90.6	316,171	92.2	21,879,715	19,609,565	89.6	561,767	92.6
Transcon Lines	73	26,819,047	23,081,291	87.1	1,454,400	92.5	30,302,989	26,843,460	84.4	2,502,500	92.0
United-Buckingham Freight Lines	20	25,149,283	27,155,501	96.6	(26,931)	96.5	30,003,967	28,572,990	95.2	59,275	95.4
Watson-Wilson Transportation System, Inc	42	48,173,415	48,208,991	104.7	(418,047)	103.7	37,618,055	37,606,055	99.9	0	99.9
Western Truck Lines, Ltd*		14,293,083	14,243,851	99.7	(80,904)	99.2	18,488,433	18,114,308	97.8	53,488	97.8
Totals		469,468,355	466,421,210	96.3	5,903,774	96.5	542,538,679	515,805,576	95.1	7,977,510	96.4

*—Former name was Interstate Motor Lines, Inc.
*On January 1, 1964, Gillette Motor Transport, Inc. was merged into Western Truck Lines, Ltd. and the corporate named Western Trucking, Ltd., changed to Western-Gillette, Inc.

Summary showing the number of class I and class II respondents with operating ratios within designated ranges and showing the weighted average operating ratios of such carriers

Operating ratios	Full Year				First quarter		Second quarter		Total first half	
	1962		1963							
	Before income tax	After income tax	Before income tax	After income tax						
(1)	(2)	(3)	(4)	(5)	1963 (6)	1964 (7)	1963 (8)	1964 (9)	1963 (10)	1964 (11)
100 or higher	108	113	166	167	382	263	143	128	247	175
97 or more, but less that 100	260	350	277	344	172	194	161	127	191	175
95 or more, but less than 97	184	175	146	171	74	106	131	154	118	146
93 or more, but less than 95	108	91	92	68	59	80	122	125	92	100
90 or more, but less than 93	82	85	74	87	57	70	125	115	81	96
85 or more, but less than 90	41	26	43	23	52	42	87	97	68	54
Less than 85	14	7	19	7	24	35	52	36	24	30
Total	797	797	817	817	820	810	821	777	821	776
Composite weighted ratio	95.7	97.2	95.9	97.2	98.7	97.2	94.5	94.0	96.5	95.6

*The variance in the number of class I and class II carriers indicated in the report to approximate 821 is the result of year-end carrier classification adjustments.

Summary of ratios and underlying data for 1963

Line no.	Carriers (1)	Net worth (2)	Net income: Before income taxes (3)	Net income: After income taxes (4)	Carrier operating revenue (5)	Net Carrier operating income (6)	Net book value carrier operating property plus net working capital (7)	Ratio (1): Before income taxes (8)	Ratio (1): After income taxes (9)	Ratio (2) (10)	Ratio (3): Before income taxes (11)	Ratio (3): After income taxes (12)	Ratio (4) (13)	Ratio (5): Before income taxes (14)	Ratio (5): After income taxes (15)
1	Browning Freight Lines, Inc	$65,706	$(3,557)	$2,789	$735,555	$5,448	$108,629	(4.97)	4.02	.74	(.69)	.57	3.36	(1.76)	1.66
2	Consolidated Freightways Corp. of Del	30,293,441	(397,606)	104,556	117,422,140	1,541,306	41,075,906	(1.31)	.36	1.31	(.34)	.09	2.75	(.97)	.26
3	Denver Chicago Trucking Company, Inc	14,122,660	4,130,333	2,482,222	45,150,365	4,060,151	16,485,701	29.22	17.21	9.06	9.15	5.50	24.60	25.05	14.78
4	Garrett Freightlines, Inc	11,063,588	1,906,397	1,074,661	33,749,495	2,116,577	11,381,080	17.23	9.71	5.67	5.65	3.18	18.60	16.75	9.44
5	Gilliote Motor Transport, Inc	2,329,766	316,739	200,114	8,155,500	443,741	4,554,904	13.77	13.09	5.43	3.86	3.67	9.74	6.96	6.56
6	Illinois-California Express, Inc	1,755,555	1,199,504	559,504	29,304,681	2,201,555	2,205,056	68.39	31.11	4.54	4.09	1.91	56.14	55.89	24.67
7	Pfil. Freight, Inc	8,794,950	2,511,023	1,235,670	53,290,546	294,560	10,433,715	28.56	14.06	7.13	7.16	3.53	20.06	23.15	11.84
8	Milne Truck Lines, Inc	1,469,062	254,300	187,365	6,726,053	1,110,956	1,488,066	17.31	9.54	4.55	3.75	2.84	19.75	17.08	9.19
9	Navajo Freight Lines, Inc	17,555,110	647,166	1,555,519	50,467,417	3,555,550	14,996,543	7.53	15.54	5.90	3.03	3.15	14.54	11.06	9.64
10	Pacific Intermountain Express Co	4,079,725	2,567,159	2,155,560	55,055,557	947,556	22,451,577	15.56	13.50	4.50	4.60	3.54	22.55	24.04	15.76
11	Ringsby Truck Lines, Inc	2,539,061	552,564	505,564	21,550,567	118,555	2,474,555	6.01	4.13	1.55	2.75	1.59	4.55	4.59	4.74
12	Rio Grande Motor Way, Inc	771,052	155,244	102,550	7,514,555	549,597	7,577,755	15.54	11.75	5.56	3.05	1.40	20.75	22.56	15.64
13	Tomb-Arizona Motor Freight, Inc	5,157,005	1,575,515	1,117,545	21,575,715	2,155,561	12,055,515	58.04	28.55	15.65	15.51	7.51	30.20	35.07	19.55
14	T.I.M.E. Freight, Inc	5,554,527	4,599,151	2,506,651	50,502,555	4,754,075	11,600,000	11.51	10.77	4.75	5.55	5.47	19.27	9.45	5.56
15	Transcon Lines	9,651,552	1,054,575	1,045,299	50,005,267	1,454,177	5,599,515	(10.25)	(10.25)	.05	(1.22)	(1.25)	19.50	7.05	5.49
16	United-Buckingham Freight Lines	4,542,550	(456,017)	(456,017)	27,015,055	5,455	3,455,255	10.54	5.07	2.45	1.55	1.25	15.05	15.56	5.57
17	Watson-Wilcox Transportation System, Inc	2,555,752	245,150	155,774	15,155,155	571,151									
18	Western Trust Lines, Ltd	155,950,555	21,555,505	12,555,557	545,555,575	26,545,755	175,575,055	16.55	10.55	4.55	4.05	2.55	18.05	15.56	5.57
19	Totals														

1/—Former name was Interstate Motor Lines, Inc.

Source (Annual Report 1963):
Column 2—Schedule 101, lines 45 + 55, or schedule 91, lines 25 + 35.
Column 3—Schedule 2555, line 25, or schedule 255, line 29.
Column 4—Schedule 2555, line 37, or schedule 255, line 31.
Column 5—Schedule 2555, line 5, or schedule 255, line 5.
Column 6—Schedule 2555, line 14, or schedule 255, line 14.
Column 7—Schedule 100, line 21 + 25 plus schedule 100, line 15 minus schedule 101, line 14; or schedule 90, line 15 plus schedule 90, line 10, minus schedule 91, line 9.

Ratios (expressed in percent):
Column 8—Ratio (1) ratio of net income before income taxes to net worth—column 3 ÷ column 2.
Column 9—Ratio (1) ratio of net income after income taxes to net worth—column 4 ÷ column 2.
Column 10—Ratio (2) ratio of net carrier operating income to total carrier operating revenues—column 6 ÷ column 5.
Column 11—Ratio (3) ratio of net income before income taxes to total carrier operating revenues—column 3 ÷ column 5.
Column 12—Ratio (3) ratio of net income after income taxes to total carrier operating revenues—column 4 ÷ column 5.
Column 13—Ratio (4) ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 6 ÷ column 7.
Column 14—Ratio (5) ratio of net income before income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 3 ÷ column 7.
Column 15—Ratio (5) ratio of net income after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 4 ÷ column 7.

APPENDIX—PART V

Examiner's discussion of the traffic survey and related cost analysis

As stated, the traffic survey made by the 18 representative respondents covered the week of June 16-22, 1963, on all shipments having weights of 10,000 pounds or more, and, in addition, all shipments, regardless of weight, for one day, i.e., Wednesday, June 19, 1963. For the purpose of cost analysis, these data were tabulated separately by territory, with further breakdowns as to weight group and type of handling. The study carriers also supplied certain other data to their cost analyst.

In 1960, a study of the 1959 costs for class I transcontinental motor carriers of general commodities, made by the Commission's Cost Finding Section, was released to the public as statement No. 7-60 (see footnote 8). /This refers to a page not here printed but identified in the accompanying report./ The entire operations of six carriers plus the transcontinental portion of the operations of two others were the basis of that study. Service unit out-of-pocket costs developed in that study for the year 1959 were updated to 1963 in the respondents' study by applying the Highway Form B formula to the 1963 annual reports of the 18 traffic study carriers. Service units and expenses for each carrier were assigned by weight bracket to transcontinental and other traffic in relationship to their participation therein. The accumulation of service units and expenses assigned to transcontinental traffic for all of the traffic study carriers allowed for the development of weighted average unit costs. To permit the trending of these costs to a later period, the carriers participating in the traffic study furnished their cost analyst with a restatement of their labor costs to reflect the impact on the actual 1963 costs of the contractual and contract-related increases known to become effective at the ends of the years 1963, 1964, 1965, and 1966. Similarly, the carriers furnished estimates of increases or decreases in other expenses as of the end of each of these four years. The following table compares the basic service unit out-of-pocket costs of transcontinental traffic for 1959[12] with those developed by the respondents' cost analyst for the year 1963 and yearend 1964.

Out-of-pocket unit costs (cents)

Item	Year 1959	Year 1963		Yearend 1964	
		Amount	Ratio to 1959	Amount	Ratio to 1959
(1)	(2)	(3)	(4)	(5)	(6)
Line-haul cost per vehicle-mile --	35.792	38.023	1.062	38.936	1.087
Line-haul cost per cwt.-mile -----	.13037	.13601	1.043	.13925	1.068
Pickup and delivery cost per cwt. handled----------	18.068	27.549	1.525	28.547	1.580
Platform cost per cwt. handled ---	27.604	35.826	1.225	35.248	1.276
Billing and collecting cost per shipment----------	76.216	87.896	1.153	91.639	1.202

[12] From statement No. 7-60.

On this basis, the respondents' cost analyst computes the operating ratios on transcontinental traffic, based on present revenues and costs at the 1963 and yearend 1964 levels, as 96.2 and 99.1 percent, respectively. An increase of 3 percent in the transcontinental revenues[13] would result in an operating ratio of 96.2 percent at yearend 1964 cost levels. On the basis of his studies, he concluded and testified that from a cost standpoint the general increase of 3 percent in transcontinental rates and charges is fully justified. The traffic study data and the analyst's working papers are not in the record, but in accordance with the Commission's order of August 3, 1964, they were made available to protestants for a period prior to the hearing, and they also were available at the hearing.

At about the same time, the Commission's Bureau of Accounts also was engaged in studies to up-date to 1963 the 1959 territorial costs. In statement No. 7-64,[14] issued in August, 1964, the ratios of unit costs for the first three quarters of 1963 to the corresponding three quarters of 1959, for the class I carriers included in the original transcontinental cost study (statement No. 7-60), were developed. The data in the following table are extracted therefrom.

Out-of-pocket unit costs for cost study carriers for study year brought up to current year level[1]

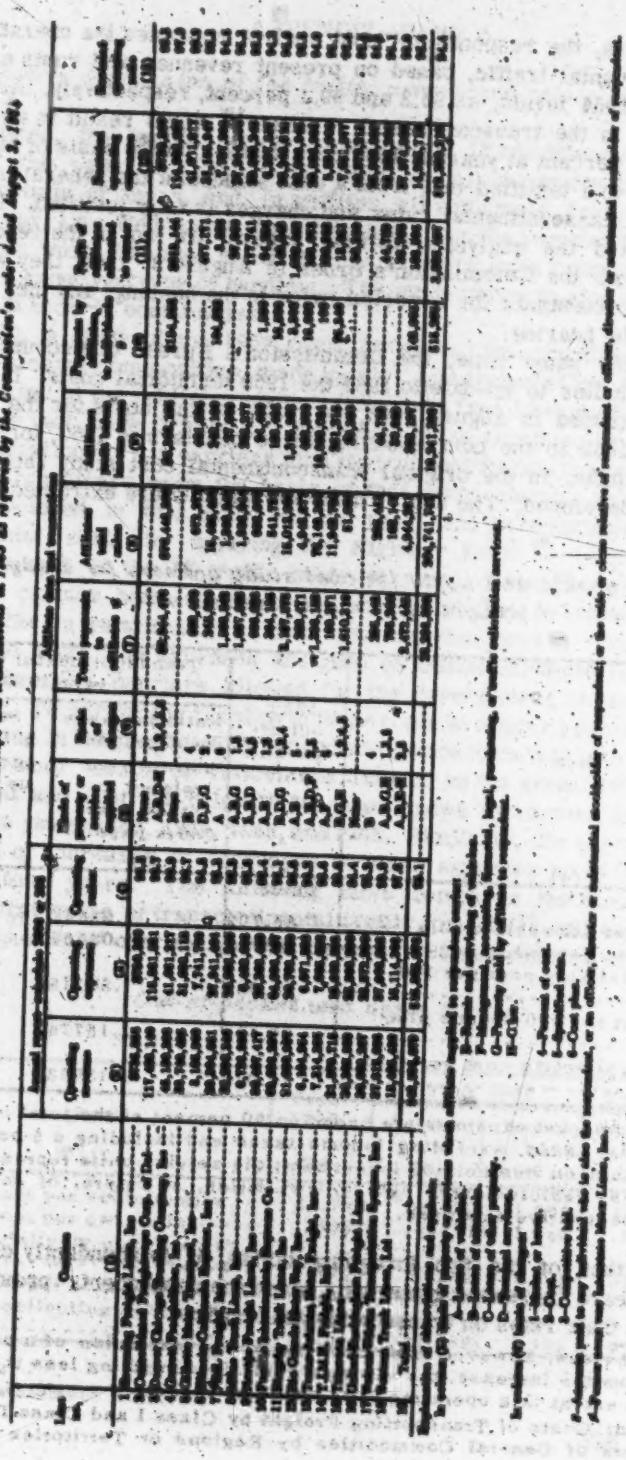
Item	1959 out-of-pocket unit costs	Transcontinental territory year 1963	
		Ratio increase or decrease current year related to study year (work papers)	Study year out-of-pocket costs brought up to current level
(1)	(2)	(3)	(4)
	Cents		*Cents*
Line-haul cost per vehicle-mile	35.792	1.05647	37.813
Line-haul cost per cwt.-mile	.18037	1.09567	37.813
Pickup and delivery cost per 100 pounds	18.068	1.30115	23.509
Platform cost per 100 pounds platformed	27.604	1.15779	31.960
Billing and collecting cost per shipment	76.216	1.13963	86.858

[1]The out-of-pocket expenses are based on 90 percent of the total operating expenses, rents, taxes, excluding income taxes and including a 5-percent allowance for return on depreciated investment; the service units represent the total vehicle-miles, vehicle-hours, cwt. or cwt.-miles, et cetera, of service which caused the respective expenses.

Under either of the two foregoing tables, it is abundantly clear that the unit costs have increased materially since the respondents' previous general increase in their rates on transcontinental traffic.

[13]It is obvious, however, that because of the exclusion of a portion of the territory from the increase, the average would be something less than 3 percent and to that extent this operating ratio would be higher.

[14]Entitled: Costs of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities by Regions or Territories for the Year 1963.



APPENDIX C

Served February 9, 1967

30356

INTERSTATE COMMERCE COMMISSION

No. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

No. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

Decided February 1, 1967

Upon reconsideration, findings in prior report, 326 I.C.C. 397, supplemented, clarified, and affirmed.

Appearances shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the instant proceeding approximately 1,400 motor common carrier respondents to tariffs published by the Rocky Mountain Motor Rate Bureau, Inc., filed a general 3-percent increase in their so-called transcontinental rates and charges, with certain exceptions not here material. Upon protest of numerous parties listed in the prior report, 326 I.C.C. 397, Division 2, Acting as an Appellate Division, by order of July 31, 1964, instituted an investigation into the lawfulness of such schedules without suspension of their effectiveness, and they became effective and have remained in effect since August 1, 1964. By order of August 3, 1964, discussed hereinafter, the division required the respondents to submit evidence. Following the submission of further proof, and oral hearing for the purpose of cross-examination, the division by report and order of April 15, 1966, found the increase not shown to be just and reasonable and required the schedules to be canceled and the proceeding to be discontinued. The Division, Acting as an Appellate Division, subsequently denied the respondents' petition for reconsideration, and the schedules were ordered to be canceled as of September 12, 1966. A petition for a finding of general transportation importance was denied by order of the entire Commission on August 24, 1966.

The United States District Court for the District of Colorado in a case entitled *Ringsby Truck Lines, Inc. v. United States*, Civil Action No. 66-C-467, temporarily restrained the effectiveness of the division's order, and in an opinion of January 5, 1967, reversed and remanded the proceeding. The court, noting the apparent departures of the rationale of the division's report from other cases of the Commission, held it was unable to determine the real reasons for the division's decision, including whether the Commission actually changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. It, therefore, held that upon remand "the Commission should explain with some detail exactly how the carriers failed to prove their case and what standards are being applied." It added, that, "if the Commission concludes that the carriers did not disclose sufficient [sic] detailed data, it should explain what type of data it is requiring." The present report is being issued in response to the court's opinion.

At the outset we do not read the court's opinion as standing for the proposition that we may not depart from rationales of prior decisions, or that we may not change the quantum or nature of proof necessary to satisfy the statutory burden of proof upon reasonable notice. The present case, in the court's view, turns on the unclearness of the prior report over whether the division has applied a new standard of proof, particularly in light of the specific references to this proceeding in docket No. 34540, *Motor Carrier Probability Sampling Studies—Forms 2, 4, 7, and 10*, decided September 29, 1966. Much of the court's opinion deals with the question whether the quantum of proof adduced by the carriers was equal to the proof which the Commission has in the past held to be sufficient. The court addresses itself to this question because it does not find any clear indication in the prior report that any new quantum of proof was required by the order of August 3, 1964. The background of this five-page order,[1] issued by the division in numerous proceedings, requires explanation.

[1] A summary of its requirements was set forth in the prior report as part I of the appendix, 326 I.C.C. at 407-408.

Prior to 1962, the Commission approved several general increases, often without detailed investigation. The general increases of the respondent motor carriers generally followed, and in certain ways supported, the increases required by the railroads to maintain their service. See *Transcontinental Motor Rates—Increases*, 49 M.C.C. 211, 213; *Transcontinental and Rocky Mountain Increases*, 54 M.C.C. 377, 378; *Transcontinental and Western Increases, 1952*, 61 M.C.C. 755, 756; *Increases, Transcontinental—Intermountain Coast*, 304 I.C.C. 15, 16–17. We explained the competitive situation of the modes of transportation in *Increased Freight Rates, E., W., and S., Territories, 1956*, 300 I.C.C. 633, 667–68, as follows:

> Whether the railroads will be able to maintain the increases here sought will depend largely upon whether their principal competitors, the motor carriers, make similar increases in their freight rates and charges. The motor carriers are not parties to this proceeding, but obviously their entire rate structure and freight revenues will be indirectly affected by the decision in this case. ***
>
> Railroad executives who testified that total freight revenues would be increased rather than reduced by the proposed increases based their opinion, in part, upon the fact that, in the past, motor-carrier rates have been quickly increased after a general freight rate increase by the railroads. In most cases if the motor carriers do not increase their rates, the railroads will not be able to maintain the increases. This fact is of particular significance when it is realized that the total revenues of the motor carriers subject to our jurisdiction are now more than half as much as those of the railroads subject to our jurisdiction.

The straitened condition of the Nation's railroads generally improved by the 1960's. While approving a general increase of the respondent motor carriers in 1963, we admonished that we were not satisfied with the quantum of evidence produced and stated:

> There is criticism that the respondents' evidence does not reveal in sufficient detail the extent to which their revenues and expenses are related to the transcontinental traffic on which the increases apply, and that some of the carriers providing data do not appear to move a substantial volume of such traffic. *** In the future, studies should be made which reflect the revenues and expenses and their relationship to the specific traffic on which the increases are to apply.

General Increases—Transcontinental, 319 I.C.C. 792, 803. In an earlier proceeding, we stated that once we had typical cost

and revenue evidence we would henceforth require further evidence concerning the appropriate profit level. We specifically recognized that the particular operating ratio (93 percent) relied upon in the past was not an immutable standard and may well have become obsolete. *General Increases—Eastern Central Territory*, 316 I.C.C. 467, 481.[2]

In this context, division 2 (by Commissioner Freas) issued its order of August 3, 1964, in this proceeding. The order required "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved." The order required "detailed data to establish the representative nature of the carriers used," and "in addition all pertinent evidence and supporting data for the individual representative carriers *** specifically relating to the traffic and territories involved," including ratios of income to investment. The order required carrier-affiliate information; and further required:

> That the traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound.

We at once note that when the order called for "detailed data," and that "such cost and traffic studies shall be shown to be representative and their selection statistically sound," that the order gave clear notice we would not accept a bare opinion that a particular group of carriers or a study period was representative. The order gave clear notice that we required objective evidence and would carefully decide the reasonableness of the

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[2] The operating ratio, or ratio of expenses to revenues, of 93 percent was first adopted in the 1940's by this Commission. *Increased Common Carrier Truck Rates in the East*, 42 M.C.C. 633, 650; *Middle West General Increases*, 48 M.C.C. 541, 550. Operating ratios even then were not considered the sole standard of revenue need, 48 M.C.C. at 553; and since those years, as noted in the prior report (at 598), there have been "recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs." These general attacks recently culminated in the decision of the entire nine-member Court of Appeals for the District of Columbia Circuit that specific findings and evidence other than bare operating ratios are necessary as a matter of law before an increase in rates may be allowed. *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 350 F. 2d 758 (1965). See also *General Increase—Middle Atlantic & N. Eng. Ter.*, 319 I.C.C. 168, 176-77; *LTL COR Rates Between East and Territories West*, 328 I.C.C. 174, 202.

opinion evidence of experts and consider the "force of their reasoning."[3]

Of course, respondents had never presented a witness' "judgment sample" of representative carriers in any past increase proceeding; nor had we relied on such opinions, unsupported by other evidence, in a general increase case. We required some further showing. For example, in *General Increases—Eastern Central Territory*, 316 I.C.C. 467, the carriers used a judgment sample that was shown to embrace 80 percent of the same carriers' revenues in the considered territory, and the study was readily reconciled with their reported data (at 471). Other objective tests of the sample were made available to us. The percentage distribution of the traffic for single-line and interline traffic was similar as between the traffic study and those carriers' annual reports to the Commission (at 494). Moreover, it was considered persuasive that the cost study carriers' participation in the considered traffic was over 66 percent of their total traffic (at 493).

A judgment sample can be made subject to objective tests and data that would show whether it is representative. If carriers seeking increased rates are grouped by relative size, a judgment sample adequately reflects the entire group, if it is shown that all sizes are reasonably represented. If carriers are grouped by relative efficiency (*e.g.*, according to their operating ratios), a judgment sample of such carriers must likewise be shown to reflect the characteristics of the entire group. If the figures are weighted, the witness must show why it is reasonable to permit the larger carrier to determine the outcome in the circumstances of that case.

In *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174, 197, we described further tests of a judgment sample that are available to an expert witness. A random sample may be taken of the remaining carriers, and the witness may either show that the remaining carriers are not significantly different from the study carriers, or if the remainder differ, apply the proper weights from the probability sample to correct for the differences.

In *Motor Carrier Probability Sampling Studies, Forms 2, 4, 7 and 10, supra*, we adhered to a prior judgment selection of carriers to participate in certain special studies only upon finding

[3] Under the ruling of *Market Street R. Co. v. Comm'n.*, 324 U.S. 548, 560-61 (1945).

that we were concerned with sampling only this particular universe, or group of carriers, *all* of whom were included. We specifically found, "Given this universe, no statistical bias will exist so long as no carriers are excluded" (page 15). The discussion concerned the proper definition of the total group of carriers under study (the universe), rather than the proper method for sampling the universe or for testing the sample. That report does not require random sampling in all cases and does not govern here.

The sample of carriers in the present proceeding do not meet the standards of proof set forth in the order of August 3, 1964. No objective tests of the sample were made, and no objective data were presented on this record to support the sample. As the court notes, the evidence consisted entirely of the opinion of one witness and the statements of company officials. The expert explained his choice on cross-examination in terms of, (1) his sample carriers "perform the principal transcontinental transportation;" (2) "by working with a numerically small group of carriers it was possible" to reflect both originating and interline traffic; and (3) the group produces "a substantial picture of the transportation characteristics of the transcontinental traffic."

No data was introduced to support these opinions, nor any showing made that the choice of carriers was statistically sound. His reasoning was not persuasive. The last two reasons apply to any sample and do not support the particular sample carriers chosen here. The first reason is not borne out by the record; there is no showing (1) of what proportion of the total transcontinental motor carrier traffic, participated in by 1,400 carriers, is handled by the 18 study carriers, or (2) that the study carriers perform the "principal" transcontinental transportation. The participation in this traffic is shown for 12 carriers without any data or reasons why these figures on participation prove an adequate sample. The cost study does not take into account the relative participation in transcontinental traffic of six carriers.

Eight of the carriers chosen by respondents for study were also studied by our staff in Statement No. 7-60. The inclusion of these eight carriers in respondents' study is not persuasive, since the staff study is limited to long-haul traffic, whereas the traffic that will bear the increase is both long-haul and short-haul.

Even if we were to assume that the study carriers were representative, we must nevertheless conclude that respondents did not prove that the period studied was typical and statistically sound, as required by the order of August 3, 1964. Respondents' witness chose the "earliest possible dates for which the carriers could organize themselves." When the witness further stated that a week was taken for truckload traffic "in the middle of June to avoid peaks in traffic," the same reason would seem to apply to less-than-truckload traffic, but only 1 day was used for the latter. No objective test of the typicality of those dates was made to show they were statistically sound.

A third ground for finding that respondents did not meet their statutory burden of proof is their failure, although given notice under the express terms of the August 3, 1964 order, that we required "evidence and supporting data" justifying the amount of profit they wished to earn over and above their operating costs. The order required operating ratio evidence, and "all pertinent evidence and supporting data" regarding the rate of return "specifically relating to the traffic and territories involved."

The respondents presented no evidence of the rates of return the study carriers, or any other carriers, had earned, or would earn (with or without the increase), on the traffic that would bear the increase in the territories involved. The rate of return evidence was shown for the overall operation of the study carriers. The evidence, therefore, does not show us what returns would be made by the carriers on the traffic that would bear the increase. Of course, even if the carriers had presented these figures, their evidence would still be deficient under the standards of proof laid down by the Court of Appeals in the *D. C. Transit System, Inc., supra*, whether the carriers relied upon operating ratio or rate of return as the ultimate test of a fair profit.

The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates. The August 3, 1964, order gave fair notice of this departure; and the witnesses that appeared for respondents were admittedly aware that the August order, consistent with earlier admonitions, laid new ground rules for this general increase proceeding. If respondents had required more time to prepare their case, an appropriate remedy was available to them.

The order of August 3, 1964 is not unique to this case, nor is our dissatisfaction with the presentation made by the respondent

motor carriers. We have applied the standards of the August 3, 1964, order consistently in other cases since about 1963,[4] and we strongly believe that a need for additional revenue through increased rates of motor carriers requires no less a showing than we have prescribed.

Addressing ourselves to the specific questions raised by the court in its opinion, we find, (1) the Commission has not changed the standard in this case from judgment sampling to probability sampling, but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative, which respondents have failed to do; (2) the quantum of proof necessary to support an increase in motor carrier rates is different and heavier than in the years prior to 1963, as set forth in decisions in and after 1963, and in specific detail in the order of August 3, 1964, in the present proceeding; and (3) the respondents' increases are disapproved, not for failure to present a credible witness or merely for failure to comply with a procedural order, but for failing to sustain their burden of proof with the type of evidence of which they were given notice. We have shown wherein the carriers failed to prove their case, and what standards apply, including the type of objective tests of a judgment sample that can be introduced to support such a sample.

We affirm the finding of the prior report that the 3-percent general increase is not shown to be just and reasonable.

COMMISSIONER GOFF, whom COMMISSIONER WALRATH joins, dissenting:

The increase has been in effect for 21/2 years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale.

[4] *E.g., General Increases, Between East and Territories West*, Docket No. I. & S. M-18827, decided November 8, 1965; *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174; *Increased Rates, Southwest, Colorado, Wyoming*, 326 I.C.C. 216.

COMMISSIONER DEASON, dissenting:

The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2 1/2 years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.

As I see it, the Commission has an affirmative role, within the framework of the act and the national transportation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission.

It is ordered, That the above-entitled proceeding is hereby reopened for reconsideration on the record as made;

It is further ordered, That for the reasons set forth in the above report the respondents herein are hereby notified and required to cancel on or before March 10, 1967, the schedules described in the order entered on July 31, 1964, by Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

It is further ordered, That since the remand of the United States District Court for the District of Colorado occasions this report and order, the compliance date of March 10, 1967, shall be stayed and postponed, if the Office of the Secretary or the Office of the General Counsel is served with a further complaint by one or more respondents in that or another court before such date, which postponement shall continue pending such further review proceedings.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(SEAL)

H. NEIL GARSON,
Secretary.

APPENDIX D

Findings of Fact and Conclusions of Law on Application for Temporary Injunction

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-65 Civil Action 285

MIDDLEWEST MOTOR FREIGHT BUREAU, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

and

THE NATIONAL SMALL SHIPMENTS
TRAFFIC CONFERENCE, INC., et al.,
Intervenors,

and

WISCONSIN MANUFACTURERS ASSOCIATION,
Intervenors.

This cause came on for hearing before this three-judge Court on September 24, 1965, upon motion by plaintiffs for an interlocutory injunction. Plaintiffs appeared by Harold C. Evarts, Esq., George D. Michalson, Esq., and Roland Rice, Esq. Defendants appeared by Sidney P. Abramson and Neil F. Convery, Assistant United States Attorneys for the District of Minnesota. The Interstate Commerce Commission

appeared by Robert S. Grisvold, Esq. Intervenors Wisconsin Manufacturers Association appeared by Philip H. Porter, Esq. All other intervenors appeared by John J. C. Martin, Esq., Larry R. Henneman, Esq., and Michael P. Sullivan, Esq.

The Court having heard the arguments of counsel, having considered the affidavits submitted, on all the files, records and proceedings herein makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

This is a proceeding to review the determination of the Interstate Commerce Commission (hereinafter referred to as "The Commission") in the proceeding designated as I and S Docket M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories,* wherein the Commission determined that certain schedules for increases in less-than-truckload class rates and minimum charges filed with the Commission were "not shown to be just and reasonable." Those schedules established increased rates and charges on class-rated, less-than-truckload shipments between, to, and from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming. By stipulation of the parties concerned, the Commission's order also embraces such rates and charges on shipments moving between Iowa, Michigan, Minnesota, Nebraska, North

Dakota, South Dakota, and Wisconsin on the one hand, and Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, and Texas on the other hand. Such schedules became effective on July 1, 1963. By Order of the Commission, Board of Suspension dated June 26, 1963, such schedules were suspended. By Order of the Commission dated August 8, 1963, the said order dated June 26, 1963, was vacated and set aside as of September 7, 1963. By report and order dated February 24, 1965, the Commission ordered the scheduled increases to be cancelled finding "that the proposed increases are not shown to be just and reasonable." By subsequent orders the Commission postponed the date for compliance with the report and order of February 24, 1965, to September 13, 1965.

II

The Middlewest Motor Freight Bureau is a corporation organized under the laws of the State of Missouri and is a trade association and tariff publishing agent for some 1,200 motor common carrier members including the motor carrier plaintiffs herein.

III

On September 9, 1965, the United States District Court for the District of Minnesota made its temporary restraining order restraining and enjoining the Interstate Commerce Commission from enforcing its said order of February 24, 1965, and thereafter modified by subsequent orders, and suspending the operation of said order of February 24, 1965. On September 20, 1965, after noticed hearing on September 16

and 17, 1965, said Court made its order extending said temporary restraining order pending a determination of plaintiffs' motion for interlocutory injunction.

IV

On September 24, 1965, this three-judge Court heard and considered the arguments of counsel relative to plaintiffs' motion for an interlocutory injunction.

V

Plaintiffs contend that the report and order of the Commission dated February 24, 1965, is unlawful on various grounds, such as being unsupported by the evidence, arbitrary, capricious, and an abuse of discretion, and that the Commission's findings represented an ex post facto application of revised standards as to the nature of the evidence required to justify the rate increases, but the plaintiffs primarily urge that their showing before the Commission justified a finding that, without the proposed increase, the operating ratio of many, if not most, of the carriers involved, would exceed 93 per cent, which the Commission had theretofore found to be reasonable.

VI

The Commission found that the evidence before it submitted by the carrier plaintiffs was of little probative value to support the proposed operating rates submitted to it, and on the hearing before this Court on the motion for an interlocutory injunction, this Court finds that the plaintiffs have failed to establish

by any persuasive showing that the Commission had done anything more in applying new standards to the record submitted, than to scrutinize with greater care the surveys which the carriers had promulgated in support of the proposed increased rates.

VII

This Court further finds on the showing before it

(a) That plaintiffs had reasonable notice of the alleged new standards which the Commission allegedly promulgated and which pertained to the degree of proof necessary to sustain the surveys made by the carriers in support of the proposed increase of rates.

(b) That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates.

(c) That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction is granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commission's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction.

(d) That plaintiffs have failed to convincingly demonstrate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable.

Conclusions of Law

1.

The plaintiffs are not entitled to an interlocutory injunction, and plaintiffs' motion therefor should be and hereby is denied.

2.

The temporary restraining order herein dated September 9, 1965, as extended by order dated September 20, 1965, should be and hereby is dissolved.

Dated this 29 day of September, 1965.

Harry A. Blackmun
Harry A. Blackmun
United States Circuit Judge

Edward J. Devitt
Edward J. Devitt
United States District Judge

Gunnar H. Nordbye
Gunnar T. Nordbye
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1393

The National Small Shipments Traffic Conference, Inc.,
and
Drug and Toilet Preparation Traffic Conference,
Appellants,

v.

Ringsby Truck Lines, Inc., et al., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS

Pursuant to Rule 16, paragraph 1(a) of the Revised Rules of this Court, Ringsby Truck Lines, Inc., and the other Appellees, who were plaintiffs in the court below, respectfully move that the appeal be dismissed on the following grounds:

(1) The appeal was not taken timely.

(2) The appeal seeks determination of questions which are moot.

(3) The Interstate Commerce Commission accepted the remand from the court and entered its report and order on reconsideration, thereby precluding an appeal by these intervenors.

STATEMENT

This is a direct appeal from an interlocutory memorandum opinion and order of a three-judge district court.

The appellees are motor common carriers that filed a complaint in the United States District Court for the District of Colorado, seeking judicial review of the report and order of the Interstate Commerce Commission in *Increased Class & Commodity Rates, Transcontinental,* 326 I.C.C. 397 (J.S. App. B). The Commission had ordered cancelled a three percent general increase in motor common carrier rates and charges, which the Commission found had not been shown to be just and reasonable. Appellants, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, which had not been parties to the proceeding before the Commission, were permitted by the court to intervene as defendants. These intervenors included a counterclaim in their answer to the complaint.

The district court, constituted as a three-judge court, on January 5, 1967, vacated and set aside the Commission's order and remanded the matter to the Commission for further proceedings in conformity with the court's memorandum opinion and order (J.S. App. A). The court made no disposition of the intervenors' counterclaim.

The Interstate Commerce Commission reopened the proceeding for reconsideration on the record as made. The Commission's report and order on reconsideration, *Increased Class & Commodity Rates, Transcontinental,* 329 I.C.C. 420, was decided February 1, 1967, and served February 9, 1967 (J.S. App. C).

On February 27, 1967, the motor common carriers returned to the United States District Court for the District of Colorado, seeking judicial review and to have the court set aside, annul and enjoin the order of the Commission issued after remand from the court (J.S. 8). The defendants United States of America and Interstate Commerce Commission have filed their answer. Briefs are being filed pursuant to a stipulation approved by the court.

On March 6, 1967, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference filed and served their notice of appeal to the Supreme Court of the United States from the memorandum opinion and order of the district court made and entered on January 5, 1967. Neither the United States of America, the Interstate Commerce Commission nor any other intervenor filed a notice of appeal.

ARGUMENT

The appellants have appealed from an interlocutory memorandum opinion and order of the district court. The appeal was not timely because it was not taken within the time prescribed by the statute.

Title 28 U.S.C. Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an

order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Title 28 U.S.C. Section 2101(b) provides:

> Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

In *United States of America v. United States Smelting, Refining & Mining Company,* 339 U.S. 186 (1949), a three-judge district court held that the Interstate Commerce Commission orders were unlawful because not supported by evidence and remanded the matter to the Commission. No appeal was taken from the decision. On remand the Commission, without taking more evidence, again entered cease and desist orders against the carriers. The district court again held the orders unlawful. In answer to the argument that the first order of the district court was the law of the case because no appeal had been taken, this Honorable Court held at page 198:

> Finally it is contended that the District Court judgment should be affirmed because there was no appeal from the judgment and mandate when the case was sent back to the Commission, the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered. Appellees argue that that decision became the law of the case. The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided,

> that should end the matter. * * * It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. * * * When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. (Citations omitted)

The United States of America and the Interstate Commerce Commission did not appeal from the memorandum opinion and order of the court below. Instead, the Interstate Commerce Commission reopened the proceeding for reconsideration in attempted compliance with the remand from the court. Anticipating further review proceedings before the United States District Court for the District of Colorado, the Commission provided in its order at 329 I.C.C. 428 that the date for compliance with its order would be automatically postponed if its Office of the Secretary or Office of the General Counsel were served with a further complaint in that or any other court. By incorporating such provision in its order the Commission eliminated the necessity for a temporary restraining order or an interlocutory injunction to maintain the status quo pending further review.

The interlocutory nature of the memorandum opinion and order of the district court is emphasized by reference to the fact that defendant Interstate Commerce Commission accepted the remand and reopened the proceeding.

The greater portion of appellants' jurisdictional statement is devoted to the restraining order and matters incidental thereto, which are all interlocutory. Appellants have asserted that the restraint on the operation of the Commission's order imposed by a single district judge was permitted to remain in effect from September 9, 1966, to January 5, 1967 (J.S. 4). Appellants have inadvertently overlooked the order dated November 4, 1966, following a full and complete hearing on the merits and all pending motions. That order was signed by each of the three judges of the district court and ordered that the temporary restraining order shall be and remain in effect in accordance with all the terms and provisions thereof until the determination of the application for interlocutory injunction by the court. That order was dispositive of all the motions made by the appellants.

Appellants' reference to Rule 65(b) of the Rules of Civil Procedure is also inappropriate. The temporary restraining order was entered by District Judge Hatfield Chilson on September 9, 1966, following a hearing pursuant to notice. The defendants were represented by Milton C. Branch, Esq., Assistant U.S. Attorney, and William F. White, Esq., appeared on behalf of intervenors. The restraining order was not granted without notice. Furthermore, Rule 65 specifically does not apply to actions brought under Section 2284. See Subsection (e) relating to district courts of three judges.

Appellants included a counterclaim in their answer to the complaint. The memorandum opinion and order of the court below made no findings or decision with respect to that counterclaim, but merely remanded the matter to the Commission for further proceedings in conformity with the court's opinion.

Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon the express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The court below did not make the findings contemplated by Rule 54(b); it did not direct the entry of a final judgment; no final judgment was entered. The memorandum opinion and order of the court below, entered January 5, 1967, was merely interlocutory. The time for appeal from such order was limited to thirty days by Title 28 U.S.C. Section 2101(b) and expired February 6, 1967. The appellants waited until the sixtieth day after the entry of the order of the court below. The notice of appeal having been filed on March 6, 1967, was not timely.

Appellants are asking this Honorable Court to review questions about the temporary restraining order and various matters related thereto. All such questions are moot. The restraining order is no longer in effect. The order of the Interstate Commerce Commission against which the restraining order was operative is no longer existent. Following remand from the district court, the Commission reopened the proceeding and issued its report and order on reconsideration, which is now pending before the same court below for further judicial review. No question as to temporary restraining order, interlocutory injunction or surety bond can arise, because the Interstate Commerce Commission postponed the date for

compliance with its new order pending further judicial review.

Appellants' arguments relating to the temporary restraining order, their motions for bond, security arrangements, impounding funds, and so on, are moot. There is no relief which the Honorable Supreme Court could give appellants, assuming that the district court below was in error. Appellants ask the Court, in effect, to rule on an abstract principle of law and lay down the rules for guidance in future cases. This Honorable Court has traditionally and historically refused to entertain such proceedings. Nothing this Court may do by reference to the temporary restraining order or appellants' sundry motions before the district court below can in any way affect the parties that are before it. These issues are now of academic interest only. Appellants can win nothing by their abstract point. Compare *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367, 371, (1960) and cases therein cited. The passage of time and the action of the Interstate Commerce Commission in itself staying its report and order now pending below have relegated this entire matter to historical interest alone. The issues are legally moot.

This appeal should also be dismissed on the authority of *Boston & Maine Railroad Co. v. United States of America*, 358 U.S. 68 (1958). In that case this Honorable Court dismissed an appeal from a judgment of a three-judge district court remanding a matter to the Interstate Commerce Commission, when the Commission expressed its readiness to proceed in accordance with the terms of the district court's remand.

In view of the fact that the Interstate Commerce Commission has issued its report and order on reconsideration

in attempted compliance with the terms of the remand, there is actually no pending controversy as to the memorandum opinion and order of the court below and issues relative thereto are moot.

CONCLUSION

Since this appeal is from an interlocutory memorandum opinion and order of the court below and was not filed within the period prescribed by statute, and since the Interstate Commerce Commission undertook to comply with the court's memorandum opinion and order by issuing a report on reconsideration which is now under review in the same court below, and since the issues are moot, the appeal should be dismissed.

Respectfully submitted,

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June 9, 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

v.

RINGSBY TRUCK LINES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION SUGGESTING AFFIRMANCE

This appeal seeks to set aside a decision of a three-judge district court (J.S. App. A) reversing and remanding an Interstate Commerce Commission order in *Increased Class & Commodity Rates, Transcontinental,* 326 I.C.C. 397 (J.S. App. B). The Commission ordered 1,400 motor common carriers to cancel, on or before September 12, 1966, a general three percent increase in their transcontinental[1] rates and

[1] "Transcontinental" traffic here refers to motor shipments transported in interstate commerce across an imaginary line extending through Denver, Colorado, by motor common carrier parties to certain tariffs of the Rocky Mountain Motor Rate Bureau.

charges. The Commission found that the carriers had failed to sustain the statutory burden of proving that the newly filed increases were just and reasonable, because (1) they failed to show that the sample group of 18 carriers which was studied was representative of all 1,400 carriers (326 I.C.C. at 405); (2) they failed to show that the period selected for study (one week for some data, one day for other data) was typical of a full year's operation (*ibid.*); and (3) various income and operating ratios of the carriers as a group, together with the absence of representative cost and revenue data, indicated that the motor carriers had not shown a revenue need for an increase (*id.*, at 406).

The Commission's order never became effective. After fifteen motor carriers filed a complaint seeking to enjoin the order, a judge of the United States District Court for the District of Colorado, on September 9, 1966, over the opposition of the government and the appellants, entered a temporary restraining order. The statutory three-judge district court continued the restraining order on November 4, 1966, and, after a hearing, entered a permanent injunction, holding that a "remand is necessary because the Court is unable to determine the real reasons for the Commission's holding" (J.S. App. A, p. 13), and directing the Commission on remand to "explain with some detail exactly how the carriers failed to prove their case, and what standards are being applied" (J.S. App. A, p. 14). On February 1, 1967, less than one month after the district court remanded the proceeding, the Commission entered a further report and order (J.S. App. C), at-

tempting to comply in full with the court's request for additional findings. The Commission again ordered the general increase cancelled but provided that the filing of a new complaint in the district court would automatically stay the effectiveness of its order. Such a complaint was filed in the District of Colorado by the same appellee motor carriers on February 27, 1967, thereby staying the effectiveness of the new order. This second suit is still pending in the district court.

Appellants raise two questions on this appeal: (1) Did the district court err in restraining enforcement of the Commission's order during the pendency of the case (September 9, 1966, to January 5, 1967)[1], and (2) did it err in setting aside the Commission's order and remanding to the Commission for clarification? We suggest that this Court might appropriately affirm the district court's order summarily because the first issue presents no substantial question warranting review and the second issue is moot.

1. The district court has express statutory authority to issue a temporary order restraining the effectiveness of an order of the Interstate Commerce Commission, 28 U.S.C. 2284. Whether the court will issue such an order in a particular case lies within its sound discretion. See *Stott* v. *United States*, 154 F. Supp. 389 (S.D. N.Y.). While we disagree with the court's finding that irreparable injury would result to the appellee-carriers if the Commission's order reinstating

[1] The temporary restraining order resulted in the continuance of the higher rates which the Commission had found to be unsupported by appellees' application.

lower rates were permitted to become effective, we cannot say it was so unreasonable, in the light of plaintiffs' showing, as to be clearly erroneous. This question is not moot, because it would affect appellants' claims for restitution of charges paid under the increased rates; but in our view it does not warrant plenary review by this Court.

2. The district court's ruling on the merits—that the Commission's final order was fatally unclear—is moot. The Commission's speedy issuance of a new order designed to meet the court's objections renders any disagreement with the court's action of merely academic interest. Review by this Court at this stage would thus serve no useful purpose. See *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68.

For these reasons, we believe that summary affirmance of the district court's order would be appropriate.

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ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

JULY 1967.

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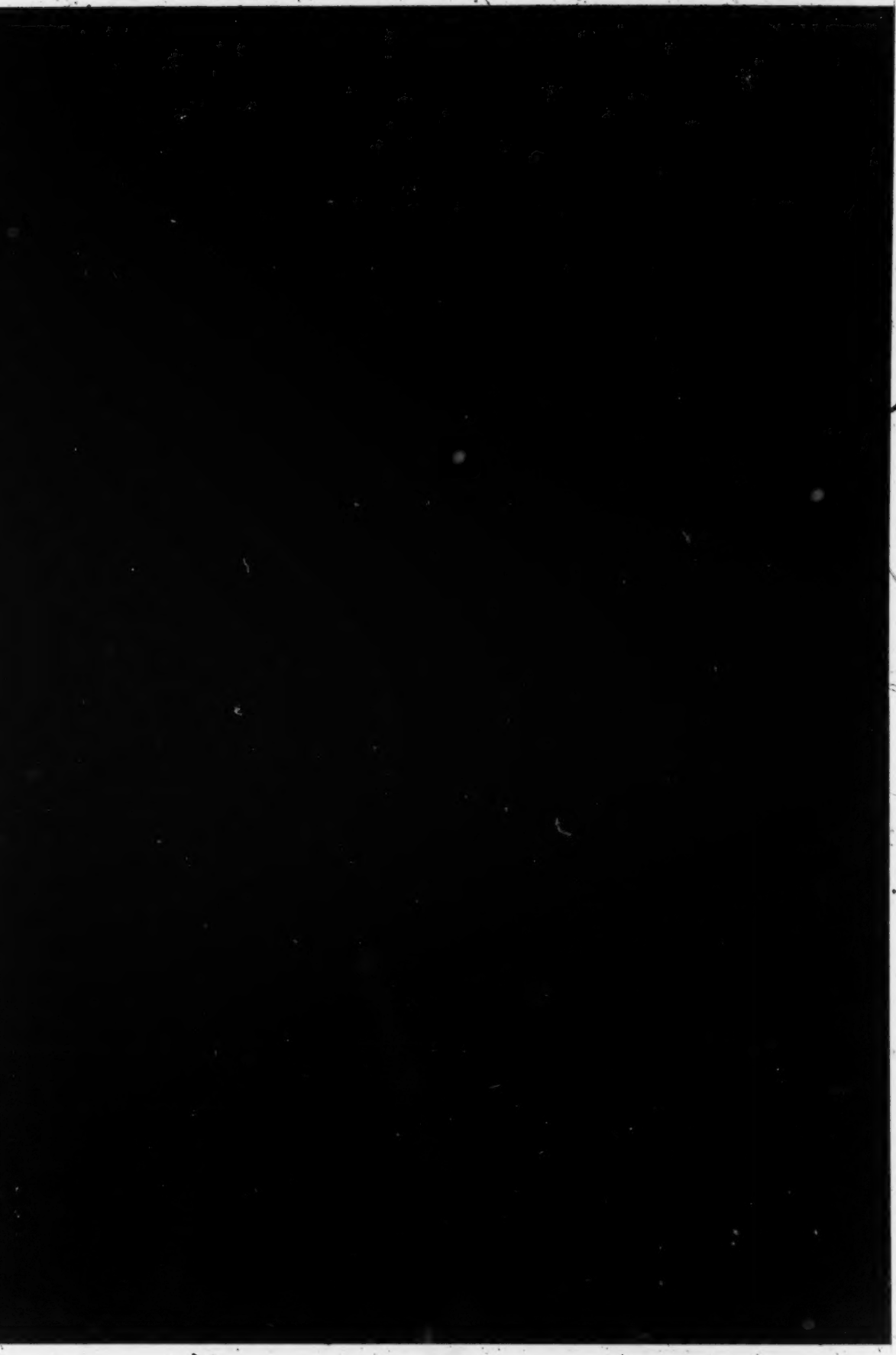

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,
and
DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants,

v.

RINGSBY TRUCK LINES, INC., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Pursuant to Rule 16 (3) of the Revised Rules of the Court, appellants submit this brief in opposition to the motion filed by the appellees to dismiss the appeal.

Statement

This appeal from the order of a three-judge court which set aside an order of the Interstate Commerce Commission, assigns error to the court below in three areas: (1) neither a threat of irreparable injury nor preservation of status and rights necessitated the restraint on the Commission's order imposed and kept in force by the district court; (2) motions presented by appellees and other parties affecting their substantial rights and legal prerogatives were left undetermined by the district court in disposing of the cause on the merits; (3) Commission authority to set and apply standards of proof in general increase cases was displaced by the district court's evaluation of the evidence measured by standards no longer in effect. In final result, the agency insisted on affirmative evidence sufficient to support findings that the increases were reasonable, while the reviewing court was satisfied to accept less.

To this appeal, the motor carrier appellees have responded with a motion to dismiss, footed on contentions that the appeal was untimely filed; mooted; precluded by a Commission response to the district court's remand. Appellants suggest that none of these conditions are present or operative here. Appellee's motion is lacking in merit and should be denied.

ARGUMENT

I.

The appeal is from a final order of the District Court and was timely made.

Appellees describe this as "a direct appeal from an interlocutory memorandum, opinion, and order of a three-judge District Court." This, of course, assumes as fact the question placed in issue by the motion to dismiss. If the district court's order was interlocutory, section 2101(b) (28 U.S.C.) fixes 30 days for appeal to this Court; if the district court's order was final, the section allows 60 days. *United States* v. *U. S. Smelting,* 339 U. S. 186 (1949), quoted by appellees in support of their position, is manifestly not controlling as decision or persuasive as dictum. The Court in that case had before it, not an order of the district court setting aside and remanding a Commission order after final hearing on the merits, but a temporary injunction granted "in order to maintain the status quo." The Court said (at p. 189):

> The matter was remanded to the Commission "for such action as it may find justifiable in the premises," and the Commission was "temporarily enjoined from requiring its formal order to be carried into force and effect . . ."

At another point the Court stated (p. 199):

> This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable.

The order issued by the district court here was an altogether different sort. It came long after a temporary restraining order had been granted and after a later order (November 4, 1966) continued the restraining order in effect. The order appealed from was issued January 5, 1967 after hearing on the merits. The order itself is the terminal portion of the district court's opinion, captioned "Memorandum Opinion and Order (JS, A-1). It is not denominated as interlocutory, temporary, or interim. The court, after declaring (JS, A-13) that the findings and reasoning of the Commission are insufficient to justify its holding, vacates and sets aside the Commission's order in these terms (JS, A-14):

> It is therefore ordered that the Commission's order . . . be vacated and set aside and that this matter be remanded to the Commission for further proceedings in conformity with this opinion.

These, of course, are the standard terms employed by reviewing courts when, after hearing on the merits, they find agency action not sustainable. The order handed down by the district court, after hearing on the merits, "sets aside, vacates, and remands." There can be little doubt that such an order is final within the meaning of 28 U.S.C. 2101(b), rather than interlocutory. The cases have so held.

The Penn-Central merger case recently before this Court in *Baltimore & Ohio R. Co.* v. *U. S.*, 87 S.Ct. 1100, is now before the district court on remand as *Erie-Lackawanna Railroad Company* v. *United States* (S.D.N.Y., 66 Civ. 2860). In a memorandum order issued July 3, 1967, the three-judge court dealt with

contentions put forth by some parties that the case before the court was terminated now that the Commission had responded to the remand with a supplemental report. These parties argued they were now free to start new actions in other courts of appropriate statutory venue. The court recognized that while this could be true in the case of an order setting aside and remanding after hearing on the merits, it was not so where the court's order was a temporary injunction. Judge Friendly, writing the opinion, stated:

> All that we had before us for decision last fall and the Supreme Court had before it on appeal, see 386 U.S. at 378, were motions for interlocutory relief, to wit, temporary injunctions of the merger . . .

He distinguished *New York Central R.R. Co.* v. *United States,* 200 F. Supp. 944, as dealing with an order and remand that was final. He stated:

> Their reliance on New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961) is wholly misplaced. The issue raised by the parties in that case was whether an action brought here should be transferred to the District Court for Maryland under 28 U.S.C. § 1404(a), and we held it could not be . . . that the Maryland District Court had taken final action, Baltimore & Ohio R.R. v. United States, 151 F. Supp. 258 (D. Md.), vacated 355 U.S. 175 (1957), and not merely granted interlocutory relief as has been done here; and, as this court noted, that the Maryland interests recognized this by bringing "an entirely new action" after the

Commission's further order, see 200 F. Supp 946 n.3.

The cases referred to are particularly apposite here. In *Baltimore & Ohio,* the Maryland district court set aside Commission orders prescribing rate parity at three ports. It remanded to the Commission. The Commission responded and issued another order which approved parity at two ports, but not the third, the Port of New York. New actions were started in two different three-judge courts, one in Maryland; the other, in the Southern District of New York. The New York court in *New York Central* denied a motion to transfer the action and retained jurisdiction of the suit. In so doing, the court considered the nature of the order previously made in *Baltimore & Ohio* by the Maryland court in setting aside and remanding. It is to that order that Judge Friendly now refers when he says: "The Maryland District Court had taken final action . . . and not merely granted interlocutory relief . . . the Maryland interests recognized this by bringing an entirely new action after the Commission's further order." The order of the Maryland court was strikingly similar to the order handed down in the instant case. The order of the Maryland court, described by Judge Friendly as "final action" directed that Commission orders it disapproved be vacated and the case remanded to the Commission to make explicit findings with respect to specified subjects. The court's order employed the customary terms, "set aside, vacate, remand." The court's opinion concluded with the statement "the case is remanded to the Commission for further proceedings consistent with this opinion"—language

comparable in every respect with that which concludes the court's opinion here.

Two considerations point compellingly to the district court's order of January 5, 1967 as one which is final, and not interlocutory: (1) the court's order, granted in its entirety, the relief prayed by appellees in their complaint. The wherefore clause of the complaint asked the court for an order "setting aside, vacating and annulling" the Commission's order in Docket No. 34462 stated to become effective September 12, 1966; permanently enjoining the Commission from enforcing "the referred to Decision, Order and Requirements;" and remanding the matter to the Commission for further proceedings consistent with the court's opinion. The order as issued, vacated and set aside the "referred to order" and remanded the matter to the Commission as prayed; (2) when, after accepting the court's remand, the Commission issued a new order (affirming the conclusion reached in its prior report) appellees did not return to the district court in the manner of one seeking to conclude unfinished business, but instituted a new action by filing a new complaint requesting the convocation of a three-judge court. Appellees did not move by petition, supplemental complaint, or other pleading before the same three-judge court which set aside the Commission's order and remanded the case. As in *New York Central Railroad Co.* v. *United States,* supra, appellees filed a new complaint docketed as No. 67-97. They did not ask in the complaint that the cause be submitted to the court convoked in the action docketed as No. 66-C-467. The Chief Judge of the Court of Appeals responded to the new complaint

with a new order designating a three-judge court, similarly constituted as to personnel, but otherwise disassociated from the prior court. It is not without significance that appellants, parties in Case No. 66-C-467, were not served with copies of the complaint filed by appellees in Case No. 67-97.

Appellees' contentions that the court's order must be considered interlocutory is at variance with the understanding and the practice of bench and bar. See *Saskatchewan Minerals* v. *United States*, 253 F. Supp. 504; 385 U.S. 94 where notice of appeal was filed in the 60-day period provided by Section 2101(b) for appeal from final orders of district court. See also *Judicial Review of Orders of the Interstate Commerce Commission*, 11 Vanderbilt Law Review 1143 at 1147.

II.

Issues raised by the appeal have not been rendered moot.

Appellees declare (Motion p. 7) that questions raised concerning the temporary restraining order and matters related thereto are moot as the restraining order is no longer in effect. Appellants maintain (JS 9-17) that the restraining order granted September 9, 1966 and continued in force to January 5, 1967 when the three-judge court handed down its decision on the merits, was in contravention of statutory provisions which make irreparable injury the indispensable condition to exercise of the extraordinary remedy of interlocutory restraint and which, in any case, stipulate that application for an interlocutory injunction

"shall be given precedence and assigned for hearing at the earliest practicable date" 28 U.S.C. 2284 (3); 2284(4). The court below failed to rule on appellees' application for interlocutory injunction or on any of the motions presented by appellants (JS, 14-16). On November 4, 1966, when the matter came on for hearing with respect to the motions, the application for interlocutory injunction, and the merits, the court announced that it is "unable at this time to make a determination of the application for interlocutory injunction". It was silent as to the motions (See Order of November 4, 1966, Appendix).* The court in fact never issued a decision on any of the motions or on the application for interlocutory injunction. Appellants' first intimation that it did not intend to do so came on January 5, 1967 when it handed down its memorandum opinion and order on the merits. If applicants are to have any opportunity at all to raise the question of the propriety of the court's action, it is only by means of this appeal that they can do so.

---

* Appellees aver (Motion p. 6) that the order of November 4, 1966 "was dispositive of all the motions made by the appellants." That this was neither the tenor, nor the result, of that order is evident from a reading of the appended copy. The motions were for an indemnity bond; for an order to protect shippers from irreparable financial loss should the Commission's order be found to have been wrongfully restrained; for an order to limit the restraint on the Commission's order to those 15 carriers who were plaintiffs in the action so as to leave unaffected the remaining 1400 tariff participants who neither sought review nor restraint of the Commission's order. These motions were presented to the court in the context of appellees' application for an interlocutory injunction with the purpose of obtaining counter-vailing relief should the court be minded to grant an interlocutory injunction. The November 4th order explicitly states that the court is unable to make a determination at this time on the application for interlocutory injunction. Although it referred to the motions as matters before it, it said nothing about rulings thereon. It is difficult to accept the claim of appellees that the motions were nevertheless disposed of *sub silentio* by the order.

For appellees to assert that "all such questions are moot. The restraining order is no longer in effect" is to deny appellants the means of reviewing the district court's actions.

That this is no mere exercise in juridical theory is clear from the fact that shippers and receivers of freight who are represented in this action by the appellants, have been subjected to heavy financial loss by unwarranted restraint of the Commission's order (JS 17). The law provides remedial procedures for the protection of shippers in such circumstances. In *Arkadelphia Milling Co.* v. *St. Louis S. W. R. Co.*, 249 U. S. 134 (1919) this court described the remedy of restitution. See also *Public Service Commission* v. *Brashear Freight Lines*, 41 F. Supp. 952 (1941); 312 U. S. 621 (1941). The subject is comprehensively explored in 73 Harvard Law Review 333 in a note titled *Interlocutory Injunctions and the Injunction Bond—Recovery for Erroneous Injunctions.*

Unwarranted restraint on a Commission order, requiring cancellation of rate increase schedules, has inflicted financial injury of extraordinary dimensions on shippers by motor carrier in the vast transcontinental territory. Their right to restitution accrued from the moment restraint was placed on the Commission's order. Access to the remedy of restitution awaits determination of issues raised by this appeal. The issues are not moot but viable. They merit adjudication by this court.

III.

This appeal is not precluded by Commission response to the remand.

If, as appellants believe, the district court erred in setting aside the Commission's order, a right accrued to the parties aggrieved to prosecute the appeal and to enforce restitutional remedies looking to restoration of financial loss sustained by improvident restraint of the Commission's order. That right and access to such a remedy is not barred by the Commission's response to the remand. Indeed, it is fortified by the nature of the Commission's supplemental report and order which reaffirmed the prior ruling holding the carriers' rate increases not shown reasonable and directed cancellation of the offending schedules. That the Commission's order left open the door for further review by "that or another court" has no bearing on appellants' right to prosecute this appeal.

Appellees by their motion do not challenge or contest the position set forth in the Jurisdictional Statement (JS 9; 20) that questions raised by the appeal are substantial in probing the fundamental relation of administrative agency and reviewing court as they interact in general increase proceedings, with special reference to standards of proof and the power of the agency to formulate and apply them. These issues inhere in the action taken by the district court with respect to the Commission's original order. Such issues survive anything the court may do in the second case brought before it. If for no other reason

than to introduce needed clarity and precision in the developing law of motor carrier regulation, appellants respectfully suggest, the appeal merits acceptance by this Court. Just such a view was expressed in *Eastern Airlines, Inc.* v. *Civil Aeronautics Board,* 345 F. 2d 488, (U.S.C.A. D.C., 1950). Eastern Airlines was permitted to intervene and file a petition to review an exemption order granted by the Board to Capital Airlines. The court refused to reject the appeal as moot saying:

> "Since the exemption order, and its successor, have expired by their own terms, we might dismiss the petition for review as moot. But judicial decision of important questions that are likely to recur should not be 'defeated, by short-term orders, capable of repetition, yet evading review'."

This Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), declined to hold a case moot where the Commission order challenged had expired by its own terms. The court said that the order under attack "may to some extent . . . be the basis for further proceedings," that questions involved in reviewing orders of the Commission are "usually continuing" and that review of the order ought not to be precluded by allegations of mootness. In *United States* v. *Trans-Missouri Freight,* 166 U. S. 290, an agreement challenged as unlawful was dissolved prior to trial. The Court nevertheless held the case not moot, as rights of other parties had not been extinguished, but still remained for the Court's determination. In *Bebchick* v. *Public Utilities Commission,* 318 F. 2d 187 (D.C. Cir. 1963)

a Commission order under attack had been superseded. It was urged that the case was rendered moot. The Court rejected the contention and said (189-190):

> We consider first Transit's suggestion that the case is moot due to supersession of the order of March 2, 1960, by the Commission's order No. 4735 of January 18, 1961. The latter order, however, continues in effect a cash fare of 25 cents. A rate order such as the one before us is not mooted by another which has the effect of keeping the controversy alive. [citing Southern Pacific Terminal, supra and Eastern Airlines, supra] Moreover, the validity of the order of March 2, 1960, during the time it was in effect before it was superseded, remains in controversy; for the disposition of any excess funds which might have accumulated prior to January 18, 1961, by reason of the invalidity of the increase, remains for decision. So we hold that the case is not moot.

Conclusion

As suggested in the Jurisdictional Statement the questions presented on this appeal are substantial. They involve fundamental rights of shipper and carrier when Commission orders are sought to be restrained. Pressing issues in this sphere have not previously reached the Supreme Court. The action of the court below is in conflict with decisions of other district courts. Such conflicts urgently call for resolution in the context of the present formative period

in motor carrier rate making. Appellants respectfully suggest that the motion to dismiss should be denied.

Respectfully submitted,

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Dated, New York July 13, 1967.

APPENDIX

Order

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 66–C–467

RINGSBY TRUCK LINES, INC., et al.

Plaintiffs,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

PORTLAND FREIGHT TRAFFIC ASSOCIATION, WEST COAST TRAFFIC COMMITTEE of the TOY MANUFACTURERS ASSOCIATION, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervening Defendants.

This matter came on for hearing today on an application for interlocutory injunction and objections thereto, trial on the merits and various motions. The temporary restraining order heretofore granted is effective until the hearing on the application for interlocutory injunction. The Court is unable at this time

to make a determination on the application for interlocutory injunction or on the merits.

Accordingly, it is Ordered that the temporary restraining order shall be and remain in effect in accordance with all the terms and provisions thereof until the determination of the application for interlocutory injunction by this Court.

Dated at Denver, Colorado, this 4th day of November, 1966.

By the Court:

JEAN S. BREITENSTEIN
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

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BRIEF IN RESPONSE TO MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF IN RESPONSE TO MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

In their memorandum to this Court, the United States and the Interstate Commerce Commission suggest that the district court's judgment might be summarily affirmed, as the first question raised on this appeal is insubstantial; and the second, moot. The first question relates to the restraint on the Commission's order imposed and kept in force, in contraven-

tion of statutory mandate. The second involves the district court's judgment on the merits and the effect of the Commission's response to the court's remand on the right of a party to appeal. A third question, of which the memorandum makes no mention, relates to motions affecting remedies of the parties that were left undetermined by the district court to the prejudice of the parties' substantial rights.

The position assumed in the memorandum is vulnerable to its own contradictions. The United States and the Commission acknowledge (p. 3) that the Commission order directing cancellation of the rate increase schedules would not expose the carriers to irreparable injury if permitted to become effective pending judicial review. Yet they view the district court's action in restraining the Commission's order from September 9, 1966 to January 5, 1967 on findings of irreparable injury, as presenting no substantial question. The memorandum states (p. 4) that this question is not moot inasmuch as "it would affect appellants' claims for restitution of charges paid under the increased rates". Yet it designates as moot the district court's judgment on the merits to which the claims for restitution, admittedly not moot, are hinged. Reversal of the district court's ruling on the merits fixes the right of restitutional recovery. *Restatement, Restitution,* § 74 (1937). In *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry.*, 249 U.S. 134 (1919), this Court, on reaching the decision that the judgment of the court below holding a rate order invalid should be reversed, required the railroad to return to shippers the excess rates collected when the Commission's order was enjoined.

One sentence stands out starkly from the recital of facts in the memorandum (p. 2): "The Commission's order never became effective." It seems reasonable to suppose that the United States and the Commission wanted to see effective an order directing cancellation of rate increase schedules found unjustified by the evidence. The United States and the Commission vigorously defended the Commission's order, under attack in the court below, as amply supported by the record, by the findings and by the report. When, following remand, the Commission issued a second report, it emphatically reaffirmed the correctness of its prior decision and reiterated its earlier order directing cancellation of the offending rate schedules (JS App. C). To the government parties, when confronted by the district court's judgment which set aside the Commission's first order, response to the remand may have appeared the simplest course to follow. They elected not to file an appeal. No such avenue was open to the shipper parties. $2,370,627 in excess charges, at the very least,* were collected by the carriers during the period the Commission's order lay under the court's restraint. If the court's judgment on the merits is erroneous, such charges were wrongfully exacted and shippers can only be made whole by restitution. See 73 Harvard Law Review, 333 at 348. To the shipper parties, the prosecution of

* The plaintiff carriers, in applying for a restraining order, supplied a guide to the measure of the pecuniary effect of the increases in issue. Revenues accruing from the increases were estimated to total $29,267 per working day for only 15 of the 1400 carrier participants in the tariffs (JS 17). For 81 working days in the period from September 12, 1966 to January 5, 1967, this totals $2,370,627 in excess revenues collected during the period of restraint for only 15 of the 1400 carriers participating in the tariffs.

this appeal is the only method of enforcing their right to just and reasonable rates stemming from the provenance of the Commission's first order. The question presented by the appeal as to the district court's ruling on the merits, is clearly not moot. That question, and the others presented, are substantial and merit plenary review.

1. The memorandum concedes error in the finding of irreparable injury by the court below, but dilutes its force by observing that it was not so unreasonable "as to be clearly erroneous". This betrays a latent misconception of the nature of the order under review. The order sought to be restrained is of a type frequently issued by the Commission. It entails consequences well understood by carriers and shippers. The order, after plenary hearing, directed the carriers to cancel rate increase schedules found unjustified by the evidence. The carrier was left free to republish rates at any level it believed it could justify. Such an order is altogether different from a rate-prescribing order which fixes rate-levels or sets minimum rates. A rate-prescribing order may indeed, if not restrained, operate to inflict irreparable injury on the carriers. An order directing the cancellation of schedules is constitutionally incapable of causing irreparable injury. As in *Middlewest Motor Freight Bureau* v. *United States,* D.C. Minn., 4th Div. 4-65 C.A. 285 (JS 11-12; JS App. D5), carriers may invoke their privilege to publish new increase tariffs immediately after the cancellation order takes effect so that irreparable injury cannot ensue. Nor is the carriers' right to review the Commission's order impaired by compliance with the cancellation order and republication of rate

increases. *Consolidated Freightways* v. *United States*, W.D. Washington N.D., C.A. No. 6990 (JS 12). As an order directing cancellation of increase schedules does not preclude the carrier from publishing new increase tariffs, it is incapable, virtually as a matter of law, of causing irreparable injury.

Stott v. *United States*, 154 F. Supp. (S.D. 1957), cited in the memorandum on the question of the court's discretion to restrain, dealt only with a temporary restraining order rather than interlocutory injunction. Even so, the court limned legal boundaries to judicial discretion. It said:

> "A temporary restraining order against the enforcement of the order of a governmental agency is a drastic remedy and will not be granted except upon a strong showing of necessity and desirability. Plaintiffs must show that specific, probable and irreparable damage will result if a stay is not granted."

On a factual situation that finds striking parallels in the instant case, the court in *Stott* found it necessary to deny a restraint where there was no showing to support the specific finding of irreparable damage required by Section 2284(3).

The intractable condition to the grant of temporary restraining order and interlocutory injunction is the threat of irreparable injury. This is the statutory requirement (28 U.S.C. § 2284(3); 5 U.S.C. § 1009(d)). It was not satisfied by the action of the court below. It was clear, unmitigated error to make findings of irreparable injury—and to restrain a Commission order directing cancellation of rate increase

schedules. Appellants suggest that the issue warrants plenary review, not only because the amounts involved in restitutional recovery are very large, but because the problem is one of recurring incidence in motor carrier revenue cases. In its handling of the temporary restraining order and the application for interlocutory injunction, the court below pursued a course that appears in open conflict with decisions in at least three other districts (JS 16). The issue merits authoritative resolution.

2. A related problem raised on this appeal overtakes the question of what the district court did in restraining the Commission order. That problem is what the court did not do with respect to the carriers' application for interlocutory injunction and appellants' motions for countervailing relief as conditions to restraint of the Commission's order.

The court failed to rule on appellees' application for interlocutory injunction or on any of the motions presented by appellants (JS 14-15). Indeed, on November 4, 1966, when the matter came on for hearing, the court announced by order of that date (Appendix, Appellants' Brief in Opposition) that it was unable then to decide the application. It was silent as to appellants' motions. The court in fact never issued a decision on any of the motions or on the application for interlocutory injunction. Appellants' first intimation that it did not intend to do so came on January 5, 1967, when it handed down its memorandum opinion and order on the merits.

The statute, 28 U.S.C. §§ 2284(3) and (4), makes it clear that the drastic remedy of temporary restraint

is not only strictly conditioned as to ground, but closely limited as to time-span. It is issued by a single judge only where an application for interlocutory injunction is made. It remains in force only until hearing and determination by the three-judge court of the application for interlocutory injunction which, the statute stipulates, is to "be given precedence and assigned for a hearing at the earliest practicable date". Contravention of these requirements operated to deprive appellants of important remedial alternatives and prejudiced their substantial rights.

Appellants' motions were for an indemnity bond; for an order to protect shippers from financial loss against wrongful restraint; for an order to limit restraint to those 15 carriers who were plaintiffs in the action, so as to leave unaffected the remaining 1400 tariff participants who neither sought review nor restraint of the Commission's order. These motions invoked remedial alternatives designed to insulate the public from pecuniary injury should the court below grant appellees' motion for interlocutory injunction. Appellants, while exposed to the inimical consequences of restraint, were deprived of protective conditions. But the ultimate deprivation resides in the district court's failure to comply with Section 2284 which required prompt, definitive ruling on the application for interlocutory injunction. That ruling was never made. Appellants thus never had the opportunity afforded by 28 U.S.C. § 1253 to appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory injunction.

As the court never acted on the motion for interlocutory injunction or appellees' motions for remedial

alternatives, but simply decided the case on the merits on January 5, 1967, appellants pursue the only course open to them as parties aggrieved by the court's action, in prosecuting this appeal from that judgment and in assigning these matters as error.

3. The memorandum describes the district court's ruling on the merits as a holding that the Commission's final order was fatally unclear. It cites the Commission's "speedy issuance of a new order" as rendering the issue moot and a matter "of merely academic interest". Appellants suggest that none of these characterizations accurately describe the question presented for review on this appeal.

A reading of the district court's opinion (JS App. A) discloses that far more is embraced in its decision than a determination that the Commission's "final order was fatally unclear". The court is preoccupied, not with the order, but with the Commission's report. So far from a simple holding that the Commission's order was unclear, the court articulates disagreement with the standards of proof applied by the Commission and the Commission's evaluation of the evidence. Thus, the court declares it to be "an obvious question" whether the quantum of proof adduced by the carriers in the present case was equal to the proof the Commission held to be sufficient in the past (JS A4). At various points in its opinion, the court displaces the Commission's evaluation of the evidence with its own (JS A6; A7; A9). Thus, while acknowledging as a truism that "the Commission is the sole judge of the weight of the evidence before it", the court declares that the carriers "presented impressive evidence to support the proposed rate", so that the Commission's

evaluation of the evidence as failing to meet the "burden of persuasion" could not stand (JS A12-13). The court does not hesitate to indicate its preference for evidentiary criteria applied by the Commission at an earlier date but since discarded (JS A7). In final result, the district court's judgment, if allowed to prevail, would mean that the Commission is deprived of power to set standards of proof in general increase cases and of the authority to determine the weight to be accorded to evidence and the testimony of witnesses. *J.B. Acton, Inc.* v. *United States,* 221 F. Supp. 174, 177 (W.D. Mo. 1963); aff'd 376 U.S. 779.

If the district court's judgment is in error, the Commission's response to the remand cannot operate to render the issue moot. Appellants are parties aggrieved by the lower court's decision. Their interest is visibly substantial. If ascertained error cannot be presented to this Court for review, their interests are effectively extinguished. This consequence is in no wise inhibited or lessened by the Commission's response to the district court's remand. Indeed, the Commission's second order, and the events which followed it, establish indisputably that, if this appeal cannot be maintained, on grounds of mootness, appellants have lost not only the right to appeal afforded them by 28 U.S.C. § 1253, but their remedy for restitutional recovery.

The Commission's second order reaffirms the findings and conclusion of the first report and order (JS App. C). The order again directs the carriers to cancel the schedules found not shown justified and fixes a compliance date. Unlike the first order, it includes a stay should court action be instituted by the

carriers, in which case postponement of the effective date is to continue pending review proceedings. As speedy as the issuance of this new order, was the carriers' invocation of judicial review (JS 8). Thus, the second order is effectively stayed pending judicial review and shippers disabled from applying to the reviewing court for indemnity bond or other means of protection from irreparable financial loss.

Appellants' status as parties aggrieved, their right to appeal under § 1253, their remedy for restitutional recovery, prevent the acquiescence of the government parties and the Commission's response to the district court's order of remand from rendering this appeal moot. The questions presented by this appeal are, in all respects, viable, substantial, and warrant plenary review by this Court. They call compellingly for authoritative resolution. Indeed, their affirmative determination on this appeal will render moot the action instituted by the carriers in the district court to review the Commission's second order.

Of *Boston & Maine R. Co.* v. *United States,* 358 U.S. 68, this must be said. The decision of the Supreme Court in dismissing both appeals there filed, was limited solely to the question of the Commission's jurisdiction which it found "prematurely presented for decision". It dismissed without prejudice to raising the issue again. It is noteworthy that no invidious consequences were visited on the appellants in that case by dismissal. In No. 310, the appellants obtained, under the district court's decision, the further investigation they sought. In No. 322, the appellants declared: "The complainants did not seek money damages." It is suggested that the pertinent

authorities here, on the question of warrant for and utility of review by this Court, are *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, and the other cases cited in the Brief in Opposition (pp. 11-13).

For these reasons, appellants respectfully suggest that the questions presented on this appeal are substantial and warrant plenary review.

Respectfully submitted,

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Dated, New York August 2, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL., APPELLANTS

v.

RINGSBY TRUCK LINES, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This memorandum is submitted in response to this Court's order of October 23, 1967, requesting the United States and the Interstate Commerce Commission—

> * * * to address themselves further to the issue of mootness in this case, in particular to the statement in their memorandum that the issue with respect to the restraining order entered by the District Court "is not moot because it would affect appellants' claims for restitution of charges paid under the increased rates."

The Commission's order in this case directed the cancellation of a general 3 percent increase in trans-

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continental rates filed by some 1,400 motor common carriers (326 I.C.C. 397). The new rates went into effect before the Commission's decision and have remained in force ever since because the Commission's order never became effective. On suit by the carriers, the district court issued a temporary restraining order enjoining the Commission's cancellation of the increase. After hearing, the district court vacated and set aside the Commission's order and remanded the matter to the Commission for clarification of its reasoning (J.S. A1–A14). The Commission reopened the case promptly and, less than one month after the district court's decision, it again ordered the rate increase cancelled (329 I.C.C. 420). However, the new order provided that the filing of a complaint in the district court challenging it would stay its effectiveness (329 I.C.C. at 428). Such a suit was promptly filed and is still pending in the district court.

The question of mootness bears upon two aspects of this appeal: (1) whether the district court erred in setting aside the Commission's order on January 5, 1967; and (2) whether it erred in restraining enforcement of the Commission's order on September 9, 1966, until it remanded the case. In our memorandum suggesting affirmance, we stated that this Court might appropriately affirm the district court's judgment summarily because the first issue is moot and the second issue presents no substantial question warranting review. Upon reconsideration, we are satisfied that both questions are substantially moot.

1. No rights or remedies of appellants will be foreclosed if this Court dismisses their appeal or affirms

the judgment below: all issues as to the merits of the Commission's cancellation of the rate increase can be considered in the pending district court action to review the Commission's second order, and, if necessary, on appeal from that judgment. The district court did not pass on any issue involving the merits of the increased rates; it held only that "the Court is unable to determine the real reasons for the Commission's holding * * *" (J.S. A–13), and remanded for clarification. Thus, it did not decide whether the existing record would support the Commission's ruling that the motor carriers had not sustained their burden of proving the increased rates to be just and reasonable. Higher rates paid under a court order staying the effectiveness of a Commission rate determination pending review proceedings are subject to restitution [1] if the Commission's order is ultimately sustained. *Atlantic Coast Line* v. *Florida*, 295 U.S. 301.[2] Accordingly, the

[1] Restitution is an equitable remedy whereby shippers can recover monies paid under a court order which keeps in effect rates which are ultimately found to be illegal. See *Atlantic Coast Line* v. *Florida*, *supra*, at 309–311; *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785–786. It is distinct from reparation, which is a statutory remedy (49 U.S.C. 304, 304a; see *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464) not involved here.

[2] In *Coast Line* after the agency's first order requiring increases in rates was set aside for lack of findings (282 U.S. 194), its second order was sustained (292 U.S. 1). Thereafter, this Court held that restitution should be denied for the period of the first order, during which the higher rates were paid, based upon a consideration of the grounds set forth in the Commission's second order. Similarly, here, if the second Commission order requiring cancellation of the increases is sustained, restitution may be granted from the time the first cancellation order was restrained.

district court's order does not bar appellants from recovering the higher charges they have paid, if the Commission's order, as clarified on remand, is upheld in the case now before the district court.

Upon these considerations, we have characterized the court's remand of January 5, 1967, as moot. To be sure, if this Court were now to reverse the judgment and, at the same time, affirm the Commission's order, appellants might obtain restitution sooner. But, in the present posture of the case, it appears to us most unlikely that the Court would itself review the merits of the Commission's order, and a remand to the district court would delay, not hasten, the ultimate decision. At all events, the only possible consequence of favorable action here would be to affect the date on which appellants' claim for restitution becomes collectible; their right to relief, if any, and the extent of the recovery, will remain the same if the present appeal is dismissed or the judgment below affirmed. In those circumstances, we suggest it would be appropriate to treat the present appeal as moot, or, at best as presenting a question of such minimal practical importance and legal significance as not to merit review in this Court. See *Boston & Maine R. Co.* v. *United States*, 358 U.S. 68.

2. Contrary to our previous submission, the issues raised as to the validity of the district court's restraining order are moot in every sense. That order, which is not appealable, has been supplanted by the court's remand order and the Commission's second order. If the Commission's cancellation of the higher rates is ultimately held to be valid, appellants will be

entitled to restitution for all excessive charges, including higher rates paid while the temporary restraining order was in effect. See *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 144–146; *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 785–786; *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309.

The appeal should be dismissed or the judgment below summarily affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,

and

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Appellants,

v.

RINGSBY TRUCK LINES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

In their memorandum filed July 1967, the United States and Interstate Commerce Commission (US-ICC) suggested that the district court's judgment, enjoining the Commission's order, might be summarily affirmed as the first question raised on this appeal is insubstantial; and the second, moot. The first question relates to the restraint on the Commission's order imposed and kept in force in contravention of statutory mandate. The second involves the district court's judgment on the merits and the effect of the Commission's response to the court's remand, on the right of a party aggrieved to appeal. In that memo-

randum, US-ICC acknowledged that irreparable injury would *not* result to the carriers if the Commission's order directing cancellation of rate increase tariffs were permitted to become effective pending judicial review. In this, they stated, they disagreed with the district court. They then said:

> "This question is not moot, because it would affect appellants' claims for restitution of charges paid under the increased rates; but in our view it does not warrant plenary review by this Court."

As $2,370,627 in excess charges was collected by the appellee-carriers during the period the Commission's order lay under the district court's restraint, the effect of an erroneous decision on the public can scarcely be termed insubstantial, or its correctness a matter lightly to be dismissed as not warranting plenary review. Called on by the Court (by order of October 23, 1967) to elaborate their position, US-ICC in a supplemental memorandum (filed December 1967) sought to disengage themselves from a palpably contradictory stand. Appellants suggest, they have only succeeded in confirming that the issues raised on this appeal are viable and merit plenary review by this Court.

The theory put forth by US-ICC that appellants' restitutional remedy would not suffer impairment by dismissal of the appeal, dissolves in the presence of *Atlantic Coast Line v. Florida* (295 U. S. 301). Should this appeal be dismissed, the doctrine of that case would bar appellants from recovering restitution for excess charges collected by the appellee-carriers while the Commission's first order lay under the district court's restraint. It is the district court's restraint of that *first order* that is challenged by this appeal. If the district court's action cannot be shown on appeal to have been erroneous, equity will not subject the appellee-carriers to restitution for failing to comply

with a Commission order adjudged faulty by the district court.

As to the notion that the district court's judgment, sought to be reviewed on the merits, is a species of interim remand "for clarification", and thus not appealable, US-ICC themselves put that theory to rout by their reiterated characterization of the district court's judgment as a "reversal" of the Commission's order, which they describe as placed under "a permanent injunction". In a recent case, *Louisville & N. R. R.* v. *United States*, 268 F. Supp. 71, the district court (W. D. Ky.) set aside the Commission's order on grounds and in terms strikingly similar to those employed by the district court below in calling for clarifying explanation and reasons for what the Commission had done. There, as here, the court declared that it was unable to determine the reasons for the Commission's holding. Far from questioning whether that decision is reviewable, ICC filed notice of appeal to this Court. On November 9, 1967, it filed its jurisdictional statement and on December 13, 1967, the Solicitor General submitted a memorandum suggesting that the case warrants plenary consideration by this Court. (Case No. 809, October 1967 Term, *Interstate Commerce Commission* v. *United States.*)

In the supplemental memorandum, US-ICC sound a retreat from the position they assumed originally that the issue with respect to continuation of the unwarranted restraint of the Commission's order is *not* moot. They now assert this issue is moot, or to use their words, "substantially moot".* This is footed on the belief that resti-

* Supp. Mem., p. 2: "Upon reconsideration, we are satisfied that both questions are substantially moot." This imparts to the concept of mootness, curiously elastic properties. Whether an issue is moot would appear to involve its state rather than a condition susceptible of admeasurement in degree of substantiality.

tution would survive though the appeal were to be dismissed. In those circumstances, US-ICC suggest, "it would be appropriate to treat the present appeal as moot." The corollary that US-ICC must surely be prepared to accept is that, if a restitutional remedy is lost to appellants by dismissal of the appeal, it would be singularly inappropriate to treat the present appeal as moot.

1. The Restitution Question

The Commission's *first order* directed cancellation of the increase tariffs by September 12, 1966. It was placed under the first district court's restraint on September 9, 1966; that restraint was kept in force, without ruling on the application for interlocutory injunction, until January 5, 1967, when the district court handed down its decision on the merits enjoining the Commission's order. The Commission's *second order* was issued February 1, 1967; it required the increase tariffs to be cancelled by March 10, 1967, but simultaneously stipulated that, if the carriers brought review proceedings in any court, that order would not become effective, but would be automatically postponed pending review. There are thus two distinct periods to be considered in relation to restitutional remedies: (1) September 9, 1966 to January 5, 1967, based on the Commission's first order and the first district court's restraint; (2) March 10, 1967 to final judgment, relating to the Commission's second order and the second district court's review.

It has not been disputed that appellants are entitled to restitution if the district court erred (a) in continuing in force to the date of its judgment on the merits, a restraint on the Commission's order where no prospect of irreparable injury existed; (b) in setting aside the Commission's order as inadequately supported, where its findings

and reasons were sufficient under recognized standards of review. US-ICC maintains that restitution is recoverable if the Commission's order is "ultimately" sustained. To prevail in their contention that the appeal is therefore rendered moot, they must also establish that restitution will be granted even if the district court's judgment restraining the Commission's first order is never reviewed on appeal; never adjudged to have been erroneous. *Atlantic Coast Line* v. *Florida, supra,* cannot be strained to accommodate such a result. Indeed, its holding would preclude it.

The doctrine of *Atlantic Coast Line* v. *Florida* is that restitution is not an unqualified legal right but an equitable remedy. The remedy in equity is hemmed with conditions that in *Atlantic Coast Line* operated to deny restitution. The same result would follow where, as here, the rate increases were collected because the Commission's order directing their cancellation was restrained and then enjoined by the district court in a judgment that, though challenged on appeal, was not reviewed and never reversed. In *Atlantic Coast Line,* this Court described how the federal court approaches a suit for restitution where a Commission decision ordering rate increases had been set aside as not supported by requisite findings (295 U. S. 301 at 315):

> "It [the federal court] inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion."

In those circumstances, the court leaves the parties where it finds them. Restitution will be denied. Absent an adju-

dication that the district court had erred, the court's judgment restraining the Commission's order would stand to impart color of right to the carriers' collection of the increases. No "stigma of extortion" attaches to the collection of increases where the Commission's order requiring their cancellation had been adjudged improper and the judgment stood unreversed. As Mr. Justice Cardozo stated (at p. 314):

> "This District Court whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld. 28 U. S. C. §47. Whatever power it has to compel restitution by the carrier of items subsequently collected derives from that primary jurisdiction and is ancillary thereto."

In arguing that ultimate vindication of the Commission's order will permit restitution, US-ICC overlook the disparate forums that are here involved. They say (Supp. Mem., p. 3):

> "Higher rates paid under a court order staying the effectiveness of a Commission rate determination pending review proceedings are subject to restitution if the Commission's order is ultimately sustained."

With this statement of general rule one can scarcely find fault. The difficulty is with the use made of it by US-ICC. "If the Commission's order is ultimately sustained" does not describe this case. What we have here are two Commission orders. The first order (issued to take effect on September 12, 1966) would not be ultimately sustained. It was enjoined and set aside as improper in a judgment never

to be reviewed and reversed, if US-ICC's contentions prevail. On February 1, 1967, the Commission issued a second order. If that order is sustained as proper, it could not, under the doctrine of *Atlantic Coast Line,* give rise to restitution under the first order. As the court puts it in *Atlantic Coast Line* (p. 309):

> ". . . what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter in the event of a reversal, [i.e.; of that judgment] . . ."

Sustaining the Commission's second order in the second action before the district court cannot be deemed "a reversal" of the district court's judgment in the first action setting aside the Commission's first order. If a maximum rate level were prescribed in the second order, it might provide the basis for a reparation complaint. However, as US-ICC themselves observed (Supp. Mem., p. 3), restitution is distinct from reparation, a statutory remedy described in *T.I.M.E., Inc.* v. *United States,* 359 U. S. 464, and in no wise involved here.

A residual point remains to be considered. Regardless of the disposition ultimately made of the substantive merits of the Commission's order directing cancellation of the increase tariffs, appellants have levelled a challenge at the propriety of the court's action in continuing in force the restraint of the Commission's order although no irreparable injury threatened the carriers. Monies have been exacted from the appellants by reason of this restraint for which a claim to restitution would arise were the restraint held to be improper on appeal. This is undoubtedly what US-ICC meant when they said (Mem., pp. 3-4) that they disagree with the Court's finding that irreparable injury would result to the appellee-carriers if the Commission's order were not restrained and added: "This question is not

moot, because it would affect appellants' claims for restitution of charges paid under the increased rates." Nothing US-ICC has said in its supplemental memorandum effectively negates that view. Appellants are entitled to seek review of the district court's order improperly granting a restraint. If this appeal is dismissed, nothing that can later happen by way of sustaining a Commission order to cancel the increase tariffs will permit appellants' restitutional remedies for improper restraint of the Commission's first order to survive. *Atlantic Coast Line* confirms that, no matter what happens to the Commission's second order, restitution for restraint of the Commission's first order involving excess charges collected in the period from September 9, 1966, to January 5, 1967, will be irretrievably lost if the district court's judgment setting aside the first order may not be reviewed.

2. Nature and Effect of District Court's Judgment

In the supplemental memorandum (p. 3), US-ICC impart to the district court's judgment the aspect of an interim remand with the implication that it is hardly worthy of review. This does scant justice to the gravity of issues evoked by the district court's action and its impact on the public in motor carrier revenue cases (JS 17-19). Nor can this be reconciled with what the government parties previously said in this case or what they did in comparable situations in other cases.

The government parties have characterized the district court's judgment, not as an inconclusive remand, but as a "reversal". Thus, the Commission said (JS, App. C, p. 421): "The United States District Court . . . in an opinion of January 5, 1967, *reversed* and remanded the proceed-

ing." In their first memorandum to this Court (p. 1), US-ICC again characterized the district court's action as "reversing" the Commission's order. It then described the action of the lower court thus (p. 2): "The statutory three-judge district court continued the restraining order on November 4, 1966, and, after a hearing, entered a *permanent injunction.*" (emphasis added.)

In *Louisville & N. R.R.* v. *United States,* 268 F. Supp. 71, the district court (W. D. Ky.) set aside the Commission's order on grounds and in terms similar to those employed by the district court here in calling for a clarifying explanation and reasons for what the Commission had done. In *Louisville,* the court declared, as here, that it was unable to determine the reasons for the Commission's holding and called for answers to a series of questions on which it said the Commission's report left it "completely in the dark". To the judgment setting aside that order and remanding that matter to the Commission, the Interstate Commerce Commission responded—not with a new report and a challenge to reviewability by other parties—but with a notice of appeal to this Court. Its jurisdictional statement was filed in *Interstate Commerce Commission* v. *United States* on November 9, 1967. On December 13, 1967, the Solicitor General submitted a memorandum suggesting that the case warrants plenary consideration by this Court.

The contention put forth by US-ICC that the district court's judgment of remand "for clarification" and the Commission's response thereto, render the appeal of other aggrieved parties moot would, if adopted, make the reviewing process something of an interior dialogue between district court and Commission at the expense of the rights and remedies of other parties. Nor may it fairly be urged that appellants' right to appeal should be dependent on

whether the Commission elects to respond to the district court's judgment of remand, by writing a new order. By this appeal, the shipper leagues who are the appellants seek to bring to this Court for definitive adjudication, issues evoked by the district court's action that probe the fundamental relation between administrative agency and reviewing court as they interact in motor carrier increase proceedings, with special reference to standards of proof and the power of the agency to formulate and apply them. Centrally involved is the question of unwarranted restraints placed on Commission orders and the motivation thereby provided for motor carriers to invoke the processes of judicial review for no other, and no better, purpose than to continue to collect for a little while longer, rate increases ordered cancelled by the Commission. These issues inhere in the action taken by the district court with respect to the Commission's original order. Such issues survive anything the court may do in the second case brought before it. If for no other reason than to introduce needed clarity and precision in the developing law of motor carrier regulation, appellants suggest the appeal merits acceptance by this Court.

Not *Boston & Maine R. Co.* v. *United States*, 358 U. S. 68, but *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, provides the guiding authority. *Boston & Maine* concerned a narrow jurisdictional issue that was found prematurely presented for decision. The appeal was dismissed without prejudice. *Southern Pacific Terminal* recognized that urgent questions involved in reviewing orders of the Commission ought not to be precluded by allegations of mootness.

Appellants respectfully suggest that the questions presented on this appeal are substantial and warrant plenary review.

Respectfully submitted,

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Dated, New York, December 27, 1967.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL. *v.* RINGSBY TRUCK LINES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 163. Decided January 15, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed as moot.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.